90-35

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HILARY FORETICH,
Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a federal district court's temporary restraining order, entered at the request of a child's court-appointed counsel, barring the broadcast on national television of a surreptitiously filmed intimate private meeting between the child and her mother was an unconstitutional "prior restraint."

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OPINIONS BELOW

The per curiam order of the court of appeals issuing a writ of mandamus (App. A, p. 1a) is not reported. The temporary restraining order of the district court (App. B, pp. 3a-4a) is not reported.

JURISDICTION

The order of the court of appeals issuing a writ of mandamus was filed on April 6, 1990. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

1. Introduction

Petitioner is Hilary Foretich, a 7-year-old child who is the subject of an internationally publicized marital

dispute.[1] This case concerns approximately four minutes of a one-hour commercial film that was produced by the British Broadcasting Company and that was aired by Lifetime Cable to cable subscribers in the United States on April 6, 7, 14 and 19, 1990. The sole issue is whether Hilary, who was covertly filmed in a private session with her mother when she was four years old, during which she described sexual abuse by her father, is constitutionally precluded from obtaining an injunction preventing the broadcast on television of the surreptitiously taped private conversation she had with her mother.

The district court issued a narrowly drawn temporary restraining order against broadcast of the film and set the matter down for an evidentiary hearing on the issuance of a preliminary injunction. Approximately three hours later, without hearing argument from the parties, the court of appeals issued a writ of mandamus vacating the temporary restraining order on the ground that it "constitutes a prior restraint of the use of the video footage of Hilary Foretich" (App. A, p. 1a). The court

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[1] *See, e.g.*, "Charges of Parent Sex Abuse, and a Family Left in Tatters," N.Y. Times, Nov. 14, 1987, § 1, at 1, col. 5; "Mother Cites Sex Abuse, Won't Let Father See Child; Allegations Called 'A Total Lie'; She's Jailed for Contempt in Custody Battle," L.A. Times, Dec. 20, 1987, § 1, at 2, col. 5; Mary McGrory, "When a Judge and a Mother Collide in Court," Newsday, Dec. 16, 1988, at 86; "Judge Refuses to Release Mother Jailed for Hiding Her Daughter," L.A. Times, June 20, 1989, § 1, at 4, col. 1; "In the Best Interests of the Child?", The Boston Globe Magazine, July 16, 1989, at 16; "Bill to Free Morgan Signed by President; Attorneys File for Release from D.C. Jail," Wash. Post, Sept. 24, 1989, at D1; "Girl in Custody Case Emerges in New Zealand," N.Y. Times, Feb. 24, 1990, § 1, at 9, col. 4; "Parents See Girl in Custody Fight," N.Y. Times, March 19, 1990, § 1, at 16, col. 6; Suzanne Fields, "Doubts that Stalk Hilary's Sad Saga," Wash. Times, March 1, 1990, at F1; Mary McGrory, "Hilary's Appalling World," Wash. Post, March 4, 1990, at C1.

See also M.A. Faber, "The Tormenting of Hilary," Vanity Fair, June 1990, at 120; C. Fremon, "The *Real* Elizabeth Morgan Story," Moxie, Feb. 1990, at 20; "Hiding Hilary," Glamour, Nov. 1988, at 248.

of appeals ruled that Hilary's rights may only be "redressed in legal actions that do not require a prior restraint in derogation of the First Amendment." *Id.* We seek review by this Court because we believe the court of appeals erred in concluding that the restraining order against the public broadcast of the surreptitiously taped private conversation violated the First Amendment.

2. Background

Hilary Foretich is the daughter of Dr. Eric A. Foretich and Dr. Elizabeth Morgan. Her mother gained international celebrity because of her refusal to produce Hilary and make her available for court-ordered visitations with her father. The mother alleged that the father had sexually abused Hilary. The parents' charges and countercharges are recounted in *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). After spending 25 months in prison for civil contempt because of her refusal to disclose Hilary's whereabouts, Dr. Morgan was released when Congress enacted Pub. L. No. 101-97 (1989).

3. The Graphic Interview Session

In December 1986, when Hilary was four years old, her mother brought her to the office of Dr. Mary L. Froning, a psychologist who had been assigned in January 1986 by the Chesapeake Institute to see Hilary in therapy sessions. The Chesapeake Institute had been selected by Dr. Morgan and was paid a fee by Dr. Morgan for these sessions.

Hilary and her mother were taken to a room where their session was photographed by a video camera. Hilary was asked by a psychiatrist, in the presence of Dr. Froning and her mother, to describe, by the use of dolls, what her father had done to her. Hilary then stated that she did not want to tell her story in the presence of the psychiatrist and Dr. Froning. Both then left the

room, but the video camera continued to photograph the session between Hilary and her mother.[2]

While using the dolls, Hilary described, in graphic terms and with animated gestures, what her father had done to her. On the film of this session in the respondents' one-hour film feature, the graphic conversation between Dr. Morgan and Hilary is also set forth in subtitles.[3]

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[2] The record in the district court does not disclose whether the video equipment was visible, but Dr. Froning testified that the four-year-old child had been told she would be filmed. App. C, p. 44a. Dr. Froning's testimony, which was presented at the hearing on the request for a temporary restraining order, is set out in full at pp. 37a-54a of Appendix C, which contains the unabridged transcript of proceedings before Judge Sporkin on April 6, 1990.

[3] The text reads as follows:

HILARY: Make the Daddy doing . . . to make the bad things. Now take off . . .

DR. MORGAN: Okay, now you tell me you want me to take the pants off, or do you want to take the pants off?

HILARY: Because the daddy took the pants so he could poke the little child in the hiney.

Poke her . . . poke her in the hiney.

DR. MORGAN: Okay. And then we'll pretend.

Now, when I say we'll pretend we're just going to pretend that the dolls are doing it because it makes me a little unhappy to really do that to the dolls.

So you tell me if that's . . .

HILARY: Poke her like that.

DR. MORGAN: And then what else?

HILARY: Slaps her with his clothes off.

DR. MORGAN: Does he slap her with his hand?

HILARY: Yeah.

DR. MORGAN: And anything else?

HILARY: No.

DR. MORGAN: Does he slap her with his clothes on? Should I put his clothes back on? Or does he slap her without the clothes on?

* * * *

[Continued]

During the conversation with her mother, Hilary used the dolls that were made available to her to show how the individuals were positioned. Her voice—including inflections exhibiting exuberance, anger and excitement—is clearly portrayed in the film, as are her bodily gyrations during the narration.[4]

4. The Tapes Are Provided

The BBC received the tapes for incorporation into its film from Dr. Froning, who said she had been given permission to provide the tapes by Dr. Morgan. The only condition imposed by Dr. Froning on their use was that Hilary's face had to be obscured. Dr. Froning testified

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[3] [Continued]

HILARY: And Heather was sleeping, and then she got poked, okay? Okay, she got poked. Daddy comes along and pokes her.

DR. MORGAN: Show me what the other scary . . .

[Child slaps.]

* * * *

HILARY: Writing right there.

DR. MORGAN: That's what you wrote, and that's what I write okay?

HILARY: My daddy has a penis.

DR. MORGAN: Tell me where he puts it. Okay, what is that?

HILARY: Mouth.

DR. MORGAN: Where else does he put it?

HILARY: [Points to her genitals.]

DR. MORGAN: Okay, what do you call that?

HILARY: A hiney.

DR. MORGAN: Where else does he put it?

HILARY: In the ear.

[4] A second portion of the film was taken in Dr. Morgan's home by a video camera. It shows Hilary crying loudly and wriggling in her mother's arms when a social worker comes to take her for a visitation with her father. The crying continues for approximately one-and-a-half minutes. In the district court, respondents voluntarily agreed that they would not broadcast this portion of the film involving Hilary if they were restrained from broadcasting the sexual abuse portion of the film. *See* App. C, p. 57a.

that the reason for this limitation was that Hilary was still in hiding, and that she did not want her to be discovered (App. C, p. 40a). Upon examination by Judge Sporkin, Dr. Froning acknowledged that she had not secured permission from Hilary's court-appointed guardian *ad litem* to provide the tapes to the BBC (App. C, pp. 51a-52a).

5. The Timing of the Broadcast

The Morgan-Foretich marital dispute was and continues to be a subject of substantial public interest. No urgency was stated by respondents for broadcasting the film *Hilary in Hiding* on the particular dates in April. The respondents' commercial arrangements with television stations apparently controlled the timing of the broadcast.

6. The Lawsuit

Dr. Foretich initiated this action on April 5, 1990, seeking temporary and permanent relief on his own behalf and on Hilary's against any "airing, licensing or distribution" of the film *Hilary in Hiding* so long as it contains the above segments of Hilary on camera. The initial Complaint appears as Appendix D, pp. 59a-63a. Joining the complaint as one of counsel for the plaintiffs was Linda P. Holman, Esq., who had been appointed by the Superior Court of the District of Columbia as guardian *ad litem* for Hilary.

The complaint stated that Ms. Holman objected to the airing of the tape of the therapeutic session as well as the tape of Hilary's reaction to the arrival of the court-appointed social worker. She stated that "[t]he therapeutic tape is being broadcast in violation of Hilary's doctor-patient privilege, as I have not waived her right to confidentiality" (App. D, p. 62a).

7. The District Court Hearing

The case came on for hearing on the plaintiffs' request for a temporary restraining order before District

Judge Stanley Sporkin on the morning of Friday, April 6, 1990. After hearing from counsel for Dr. Foretich and for the respondents, Judge Sporkin concluded that Hilary required separate representation. He appointed Nathan Lewin, Esq., undersigned counsel, to represent Hilary on a *pro bono* basis. App. C, p. 20a; App. E, p. 64a.

Undersigned counsel appeared at a reconvened hearing called for 4:00 p.m. on April 6. Counsel argued that the challenged portions of the film violated Hilary's rights of privacy and that the television broadcast would do substantial present and future harm to Hilary. Counsel noted that the availability of home recording devices made it possible for total strangers to retain permanent records of Hilary's most intimate conversations with her mother regarding a subject that is likely to be highly distasteful and embarrassing during her entire life. Each broadcast of this film increases the accessibility of this filmed episode and the potential intrusion of total strangers into Hilary's private affairs, causing her irreparable harm. App. C, pp. 23a-24a.

Counsel also cited to the district court judicial precedent and other authority for issuing an injunctive order to prevent such private wrongs even if the matter enjoined might otherwise be protected by the free speech and free press guarantees of the First Amendment. And the court took the testimony of Dr. Froning, which was offered by the respondents. On cross-examination, Dr. Froning acknowledged that it is ordinarily harmful to a child to broadcast publicly the child's account of sexual abuse. In Dr. Froning's opinion, publication was justified in this case only because Hilary had to be protected from further sexual abuse (App. C, pp. 45a-50a).

8. The District Court's Order

At the conclusion of the hearing, Judge Sporkin issued an order that temporarily restrained the defendants

from broadcasting "the scenes of the program, *Hilary in Hiding*, involving the minor's description of alleged sexual abuse." Appendix B, pp. 3a-4a. The order was entered "in view of the irreparable harm that would be caused to the minor Hilary Foretich if the broadcast of scenes involving her description of alleged sexual abuse were shown as planned" (*Id.*, p. 3a). The judge scheduled a preliminary injunction hearing for April 17, 1990, at which time he indicated that he wished to hear more detailed testimony concerning the circumstances under which the videotape of Hilary had been made available to the BBC and the potential harms to Hilary from its showing.

9. The Court of Appeals' Action

Without hearing from either Dr. Foretich's lawyer or Hilary's appointed counsel, the court of appeals at 8:45 p.m. issued a writ of mandamus vacating the temporary restraining order. The court relied entirely on the legal proposition that the order "constitutes a prior restraint on the use of the video footage of Hilary Foretich" and that because there is " 'a heavy presumption against its constitutional validity' " such a " 'prior restraint' " must be vacated. The court of appeals concluded that Hilary's only remedy is "in legal actions that do not require a prior restraint in derogation of the First Amendment" (Appendix A, p. 1a). On April 11, 1990, Chief Justice Rehnquist denied petitioner's application to vacate the writ of mandamus and reinstate the temporary restraining order.

REASONS FOR GRANTING THE WRIT

The court of appeals summarily vacated the district court's restraining order in the mistaken belief that *every* court order banning future expression is a presumptively unconstitutional "prior restraint." In fact, the order issued by the district court presented few, if any, of the evils of advance censorship that have generated the constitutional "prior restraint" doctrine. This Court should grant certiorari in this case to clarify the "prior restraint" doctrine and to prevent its misapplication to other cases involving injunctions needed to protect private rights.

1. Not Every Order Affecting Future Expression Is Presumptively Unconstitutional.—The primary error of the court of appeals was its assumption that Judge Sporkin's temporary restraining order was a "prior restraint" with constitutional significance. Although the order would have prevented a small fragment of a future television broadcast, it was not censorship in the classic sense.

Almost forty years ago, Professor Paul A. Freund noted, in a landmark article, that "prior restraint" cannot automatically be placed "in a special category for condemnation." Professor Freund concluded, "The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." Freund, "The Supreme Court and Civil Liberties," 4 Vand. L. Rev. 533, 539 (1951).

More recent commentators have arrived at similar conclusions. *E.g.*, Murphy, "The Prior Restraint Doctrine in the Supreme Court: A Reevaluation," 51 Notre Dame Lawyer 898 (1976); Blasi, "Toward a Theory of Prior Restraint: The Central Linkage," 66 Minn. L. Rev. 11 (1981); Mayton, "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent

Punishment, and the Costs of the Prior Restraint Doctrine," 67 Cornell L. Rev. 245 (1982); Jeffries, "Rethinking Prior Restraint," 92 Yale L. J. 409 (1983); Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory," 70 Va. L. Rev. 53 (1984); Smith, "Prior Restraint: Original Intentions and Modern Interpretations," 28 William & Mary L. Rev. 439 (1987); Comment, "Indirect Gag Orders and the Doctrine of Prior Restraint," 44 U. Miami L. Rev. 165 (1989).

There is a world of difference between a carefully limited temporary restraining order preventing, for not more than ten days, the nationwide broadcast of a secretly filmed intimate conversation between a child and her mother and a system of broad administrative censorship or a sweeping court order that forever bans future expression of a certain kind. The former may be the only effective means of preserving a cherished personal right of privacy and may have negligible impact on public issues. The latter could chill or freeze the expression of opinion or important issues of governmental policy.

2. Judicial Preservation of an Individual's Right to Privacy May Justify a Court Order Barring a Television Broadcast.—In an instance such as this one—when specifically identifiable expression is only marginally related to public issues [5] but its disclosure unquestionably results in a serious private wrong—the proper and constitutionally permissible remedy is an injunction against publication. This Court's language in *Near v. Minnesota*, 283 U.S. 697, 709 (1931); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557-58 (1976), sug-

[5] It is precisely because the specific fragment of *videotape* at issue, as opposed to the information conveyed by Hilary's words alone, has no particular public importance that this case is entirely different from *New York Times Co. v. United States*, 403 U.S. 713 (1971).

gests that the "prior restraint" doctrine would not apply in these circumstances.

The classic illustration of an injunction to protect the rights of privacy, sustained by this Court, was the court order prohibiting commercial distribution of a documentary film taken at the Bridgewater State Hospital for the criminally insane. *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969). The grounds for issuing the injunction were that the privacy of individual inmates of the institution was invaded by commercial distribution of the film. Over a dissent by three Justices, this Court denied a writ of certiorari. *Wiseman v. Massachusetts*, 398 U.S. 960 (1970).

The Bridgewater film was surely far more relevant to a "debate on public issues" than the four minutes of film that the plaintiff sought to bar in this case. The present segment of film relates entirely to a private meeting between a 4-year-old and her mother. Nonetheless, the Massachusetts court and this Court recognized in the Bridgewater case that, when privacy rights are involved, an injunction that might otherwise appear to be a "prior restraint" is a suitable remedy.[6]

The principal decision on which the court of appeals relied in this case, *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), involved the claim of a

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[6] The same analysis was provided by District Judge Milton I. Shadur (an expert on First Amendment law, *see* 632 F. Supp. at 1294, n.17) in his opinion in *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1294-95 (N.D. Ill. 1986). The *Huskey* case involved a lawsuit against a film showing prisoners in the United States Penitentiary in Marion, Illinois. Judge Shadur denied a motion to dismiss the complaint alleging invasion of privacy by the broadcast of the film. He observed that the "prior restraint" doctrine did not necessarily bar injunctive relief that is "narrowly tailored" to preserve a privacy interest. Judge Shadur held that "prevention of a private wrong" is different from "an injunction against publication of the communication of ideas." 632 F. Supp. at 1294.

doctor whose alleged malpractice and unethical conduct had been viedotaped by investigative TV reporters. The doctor sought to enjoin broadcast of the film on the ground that the filming had violated the federal wiretap statute, 18 U.S.C. § 2511. The Sixth Circuit held that the kind of information being disseminated by the broadcast —the ethics of a doctor with "a national reputation for his diet program and medical practice"—was "the cornerstone of the free press clause of the first amendment." 898 F.2d at 57.

This case is totally different. Hilary's parents have thrust themselves into the spotlight of substantial public interest, and they themselves may have no right to prevent a public broadcast of a surreptitiously recorded film that embarrasses them or invades their own privacy. But their child—who was 4 years old when the film was made and is 7 now—should not be sacrificed for the sins of her parents.

Hilary has a personal right to privacy with regard to the details of her allegations of sexual abuse that overrides the interests and expressed wishes of either of her parents. In *Morgan v. Foretich*, 528 A.2d 425 (D.C. App. 1987), the District of Columbia Court of Appeals affirmed the trial court's decision to close the hearings of this marital dispute to the press and the public. The appellate court quoted and approved the trial court's finding that the allegations "are highly sensitive" and that "if revealed to the public would be embarrassing and damaging to the child and the child's reputation, now and in the future." 528 A.2d at 426. The court held that publication of the allegations to the world would compromise "this innocent child's right to privacy and freedom from notorious public scrutiny" and would be "adverse to the best interests of the child." *Id. Cf. Maryland v. Craig*, 58 U.S.L.W. —— (June 27, 1990) (1990 U.S. LEXIS 3457) (Recognizing that a State's interest in the protection of minor victims of alleged sex crimes " 'from

further trauma and embarrassment' is a 'compelling' one" (citation omitted)).

Nor is this a case in which the material that invades the plaintiff's privacy has been cast into the public domain by operation of law or by the actions of public officials. In *The Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989), a newspaper was found to be constitutionally privileged to print the name of a rape victim who had been fully identified in a publicly available police report. This Court's opinion made it clear that the result would have been different if the government agency had not provided the information that the newspaper publicized. 109 S.Ct. at 2611-12. And the same principle governed the decision on which the majority relied in *B.J.F.—Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

There is simply no legitimate free press interest in Hilary's highly personal communication with her mother, with whom she wanted to speak in total privacy. Dissemination of that conversation to the entire world is nothing more than a "private wrong" that can and should be enjoined.

3. The Issue Is a Recurring One Which Is Not Moot and the Court of Appeal's Ruling Affects the Ultimate Relief Available.—After the court of appeals ruled, the offending fragments of the film were shown on national television on the scheduled dates. The broadcast of the film did not, however, moot the case or the constitutional issue.

The respondents retain control of the film, and they may choose to show it any time in the future. The court of appeals' ruling obviously prevents a judge from enjoining any future broadcast.[7] Moreover, by its very

[7] Petitioner has now amended her complaint to seek damages for the respondents' invasion of her privacy. She has retained, however, a claim for injunctive relief should this Court reverse the decision of the court of appeals.

nature, a request for a temporary restraining order against a television broadcast, if denied, will become moot if review in appellate courts is not permitted after the broadcast takes place. Hence this is a situation involving the two circumstances justifying appellate review in this Court even after "abatement of the underlying injury." *See Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1255 (1990); *Meyer v. Grant*, 486 U.S. 414 (1988); *Honig v. Doe*, 484 U.S. 305 (1988), *Murphy v. Hunt*, 455 U.S. 478, 484 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1990

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7046

IN RE: LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Petitioners

[Filed April 6, 1990]

Before: Mikva, D.H. Ginsburg and Sentelle*, Circuit Judges

Upon consideration of the emergency petition for writ of mandamus, it is

ORDERED that the motion be granted. The district court's temporary restraining order constitutes a prior restraint of the use of the video footage of Hilary Foretich. Since a prior restraint has an immediate and irreversible impact, *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), "[a]ny prior restraint bears 'a heavy presumption against its constitutional validity.'" *In Re: King World Productions, Inc., et al.*, Case No. 90-1122, slip op. (6th Cir. January 29, 1990) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)). Any rights that Eric Foretich or Hilary Foretich may have must therefore be redressed in legal actions that do not require a prior restraint in derogation of the First Amendment. It is

FURTHER ORDERED that the district court's temporary restraining order entered on April 6, 1990 be and is hereby vacated.

Per Curiam

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* A separate statement by Judge Sentelle is attached.

Sentelle, *Circuit Judge*, concurring in the grant of the petition for writ of mandamus: Although I am deeply concerned that mandamus not become a means to render appealable temporary restraining orders, in the case of prior restraint I find the necessary exceptional circumstances to support issuance of this extraordinary writ, for the reasons stated by the Sixth Circuit in *In Re: King World Productions, Inc., et al.*, Case No. 90-1122, slip op. (6th Cir. January 29, 1990).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-796
(Stanley Sporkin)

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

ORDER

[Filed April 6, 1990]

On consideration of the plaintiffs' application for a temporary restraining order and the argument of counsel appointed by the Court *ad litem* to represent the minor involved in the film, and the Court's examination of portions of the film *Hilary in Hiding* that is scheduled to be broadcast on April 6, 7, 14, and 19, 1990, by the defendants, and the testimony of Dr. Mary Froning, and in view of the irreparable harm that would be caused to the minor Hilary Foretich if the broadcast of scenes involving her description of alleged sexual abuse were shown as planned, it is

ORDERED that the plaintiffs' application is granted, and it is further

ORDERED that the defendants are restrained from airing, licensing or distributing the scenes of the pro-

gram, *Hilary in Hiding*, involving the minor's description of alleged sexual abuse until April 17, 1990, at 9:30 a.m., when the Court will hold a preliminary injunction hearing on this matter.

Dated: 4/6/90

/s/ Stanley Sporkin
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CA 90-796

ERIC A. FORETICH and HILARY FORETICH,
Plaintiffs,

vs.

LIFETIME CABLE and BRITISH
BROADCASTING CORPORATION,
Defendants.

Washington, D.C. April 6, 1990 9:55 a.m.

TRANSCRIPT OF MOTION FOR TEMPORARY
RESTRAINING ORDER BEFORE
THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: ELAINE MITTLEMAN, ESQ.

For the Defendants: LEE LEVINE, ESQ.

[2] INDEX

Witnesses for the Plaintiff:	*Direct*	*Cross*	*Redirect*	*Recross*
Mary Froning	45	53	—	—

Exhibits:	*Marked*	*Received*
Plaintiff's Exhibit No.1	40	40
Defendant's Exhibit No. 1	48	48
Defendant's Exhibit No. 2	52	52

[3] PROCEEDINGS

THE DEPUTY CLERK: Eric A. Foretich, et al. versus Lifetime Cable, et al., Civil Action 90-796. Elaine Mittleman represents the plaintiff. Lee Levine represents the defendant.

THE COURT: I'll hear the plaintiff.

MS. MITTLEMAN: Good morning, Your Honor. Elaine Mittleman for—

THE DEPUTY CLERK: Please come to our lectern.

MS. MITTLEMAN: Your Honor, Linda Holman, who is the Court appointed guardian ad litem for Hilary is ill today, and she can't be here.

THE COURT: Go ahead.

MS. MITTLEMAN: We have asked for what is well acknowledged to be an extraordinary remedy which would be the—we structured our request as narrowly as possible to omit the screening of tapes involving Hilary herself on this upcoming Lifetime Cable.

One segment of the tape in particular to the best of my knowledge has not been seen on any other program besides this Lifetime Cable. It was produced by the BBC, which shows Hilary under her mother's control discussing really in a very offensive manner. I mean it is pathetic for this child to be subjected to this, specific sexual acts. She points to her own body parts. She refers to her father's genitals. It has no redeeming social value whatsoever.

[4] It is not enlightening to the public. It is inflammatory. It appeals to the prurient interests, and it is an utter invasion of Hilary's privacy. It does not edify the public.

THE COURT: Are you arguing on behalf of Hilary? I don't understand who—what your standing is?

MS. MITTLEMAN: I represent Dr. Foretich. I would be glad to speak on behalf of Hilary as well. There has been some controversy, confusion, whatever you want to call it, as to Hilary's legal representation. I

am now representing her in another legal action, but in a third legal action, Judge Gesell just recently ruled that since she had a guardian ad litem, it was up to the guardian ad litem to represent her.

Now, under the Rule 17(c), à child, if she has a cause of action, you know, the Court has its authority to appoint someone to represent her. And from the cases I read, if it is felt that the person coming forward is adequate, the Court, you know, can accept that person as the child's representative.

Linda Holman's appointment was pursuant to the visitation in the Superior Court.

THE COURT: That's the problem I have. I don't know where the standing is here, quite frankly, because I didn't appoint any guardian ad litem.

MS. MITTLEMAN: Well, that's correct, and that was [5] just the issue in front of Judge Gesell. And my position, frankly, is different than what Judge Gesell ruled. I'd be glad to—

THE COURT: Well, has Judge Gesell been in this case?

MS. MITTLEMAN: No, but we have a case in which we are suing Glamour, and I've got the opinion if you'd like to see it.

THE COURT: You're suing who?

MS. MITTLEMAN: Glamour Magazine, under defamation, and we sought to add Hilary as a plaintiff, and Dr. Foretich as her next friend, and Judge Gesell just ruled that she already had a guardian ad litem. But as I said, in another case where we have just a standard tort case, I am her attorney. So we've had conflicting rulings on that.

THE COURT: You are her attorney? Appointed by whom?

MS. MITTLEMAN: I'm not appointed by anybody. We have yet another case in front of Judge Henry Green in which we are suing under traditional tort cases. We're suing Dr. Morgan and a variety of the

experts, and Hilary is a plaintiff in that case. I am the attorney for Hilary in that case, and that has—

THE COURT: Well, who hired you in that case?

MS. MITTLEMAN: Dr. Foretich.

THE COURT: Hired you to represent Hilary.

MS. MITTLEMAN: Well, I'm representing him as well. [6] I'm representing him, Hilary and his parents.

THE COURT: Well, you see, here's my problem.

MS. MITTLEMAN: Linda Holman, who is Hilary's attorney, guardian ad litem, joins in this request.

THE COURT: But did Judge Gesell rule that a guardian ad litem appointed in another court action could have standing in his action?

MS. MITTLEMAN: No, he didn't. May I read you his—

THE COURT: Sure.

MS. MITTLEMAN: I just got this yesterday.

THE COURT: Is this a related case, by the way, Betty?

MS. MITTLEMAN: I don't think it could be considered a related case. I mean I don't know how broadly you want to define related.

It says, "Under Rule 17(c), this provision is not applicable under the circumstances of this case. In the course of the continuing dispute over Hilary, the Superior Court appointed a guardian ad litem to protect Hilary's interest. Plaintiffs do not dispute this point. The battle over Hilary continues in the Superior Court. It would be wholly inappropriate to recognize either parent as an appropriate guardian in any case."

So that's where that was left.

THE COURT: Well, I understand that. But my problem [7] is that they have appointed—as I understand the guardian ad litem, is that that was appointed for that particular case.

MS. MITTLEMAN: That would be my understanding as well.

THE COURT: And it would seem to me that if anything, I would have to appoint somebody.

MS. MITTLEMAN: I think that would be an acceptable alternative, and that would be something I would—

THE COURT: But as this point we don't have the time to appoint and, you know, I don't know how I could make that appointment without having all the interests represented.

MS. MITTLEMAN: That's right. There are cases, as I said, in which the parent's attorney was—or else in another case, I don't remember the name of it, but where teachers sued on behalf of retarded children and they were allowed to go forward because the Court said they were skilled at doing that.

THE COURT: Well, let's get by that. Let's get to the issue in this—the other issue in this case. As I understand from the papers that just came in, this television program has already been shown in the United States?

MS. MITTLEMAN: That's correct, Your Honor. It was aired once. The first time I saw the tape was two days ago. Dr. Foretich, as you may know, was in New Zealand for about three weeks, and I wasn't really able to confer with him, and it is our position that this upcoming four planned showings [8] have been widely publicized and, you know, it's on the newsletter. It's on the media, and—

THE COURT: How did they get the tape? Do you know?

MS. MITTLEMAN: That I don't know. I assume it came from the BBC. It was a BBC production. It was aired in Britain. It was enjoined—to the best of my knowledge, it was enjoined in New Zealand from being aired.

THE COURT: It has been enjoined in New Zealand?

MS. MITTLEMAN: That's my understanding. New Zealand, as everyone has been saying, has different laws than we do.

THE COURT: Where was this shown in the United States?

MS. MITTLEMAN: It was under the Lifetime Cable, I believe.

THE COURT: It was shown on the same—

MS. MITTLEMAN: My understanding is the Lifetime Cable licensed this program from the BBC. The BBC produced it.

THE COURT: So it's already been shown once?

MS. MITTLEMAN: Right. Now, on that point, I'd like to say something, if I could. Under the Pentagon papers cases, to the best of my ability to read the opinions, there were simultaneous actions in New York and here about the release of those papers. And both Courts went forward and different newspapers had released different amounts of materials and I [9] think this Court even acknowledged that, well, we know some of the stuff has already been printed somewhere else. It might go to the L.A. Times or who knows where. That didn't seem to be significant.

In other words, it is still a republication, if you will, and on that point, I'd also like to mention something about Judge Gesell's opinion, which is that on Glamour Magazine, it has been alleged that they gave permission to the friends of Elizabeth Morgan, who are the same people that are touting this program, and they distributed it to Glamour Magazine, and Judge Gesell said that that could be a republication under defamation. So I'm saying—

THE COURT: We're not talking defamation. You still have that claim.

MS. MITTLEMAN: That's right.

THE COURT: You're not going to lose that claim.

MS. MITTLEMAN: No, but my point is that four more screenings of Hilary is just four more times to have her privacy invaded. People are on notice now. They

can tape this thing, keep it in their libraries. The Ferber Court emphasized that putting these child—you know, the visual images of children in the mass media is a permanent record. It's not just a one time thing.

THE COURT: What are the particular problems? Can you do it quickly to show me what it is that you're complaining [10] about?

MS. MITTLEMAN: Yes, I'd have to find the spot on the tape, but it's only a limited segment of the tape that is particularly offensive.

THE COURT: How long is the tape?

MS. MITTLEMAN: The whole tape is I think about 40 minutes.

THE COURT: No, I don't want to see the whole tape.

MS. MITTLEMAN: No, no, I didn't—what?

THE COURT: Can you just get to the right part?

MS. MITTLEMAN: I think it's somewhere in the middle of the tape. Is there some way—I'm not—

THE COURT: Who set that up? Is that your tape?

MS. MITTLEMAN: I think it's Mr. Levine's tape.

MR. LEVINE: Your Honor, we will be specially appearing for the defendant. We provided the tape. I think the Court set up the tape machine.

THE COURT: Do you know how to get to the right parts?

MS. MITTLEMAN: I think we can fast forward it. I could clarify, there are two different tapes of Hilary. One of the tapes, Mr. Levine is correct, was seen on other shows, and it really isn't as offensive as the tape with the specific—I mean if you want to get the most narrow limiting, it's the one with the specific body parts that are offensive.

[11] THE COURT: I just want to see what you are complaining about.

MR. LEVINE: It will probably take a few minutes, Your Honor.

MS. MITTLEMAN: If you want me to, I can try to fast forward it while they are talking if that will help.

THE COURT: Well, Tom, you know how to use that machine, don't you? Go ahead. Help her. You do it for me. Go ahead. You can do it for them. Come on. Do I have to get you an order?

(Brief pause.)

MS. MITTLEMAN: This is it, Your Honor.

(Whereupon, the videotape was shown in the courtroom.)

MS. MITTLEMAN: I was just going to say, to the best of my understanding, that man is Dr. David Corwin, who was one of Dr. Morgan's expert witnesses, and the woman next to Dr. Morgan is Mary Froning, who is described as Hilary's therapist, who is a psychologist and have participated in the litigation throughout, and as far as I know, this was not admitted into evidence by any Court.

(Whereupon, the videotape was continued to be shown in the courtroom.)

MS. MITTLEMAN: I believe that's the sum of the most offensive tape. Now, I'd like, if I could just say something, if that is convincing to anyone of the reality of the [12] charges—

THE COURT: That's bad stuff, I admit that.

MS. MITTLEMAN: It's staged. It would be like third hand hearsay, you know, under the Rules of Evidence, according, you know, I mean it doesn't go to the truth of the facts, and it has no—its content is of no value. It is not informing the public and the way I read the Supreme Court cases, including New York Times versus—I mean the Pentagon papers case, it isn't a question—I was surprised at this myself, but under what is considered obscenity, which with children is a broad definition of obscenity, it is considered outside the First Amendment. It is not considered prior restraint.

Justice Brennan stated that in—

THE COURT: Are you arguing that this is obscene? Is that your argument?

MS. MITTLEMAN: I'm arguing that it's representing—it's showing a child referring to sexual acts, referring to her father's genitals, having her point to body parts which are purportedly describing sexual acts. It is certainly concerning sexual acts of a child, and, you know, there is great concern now with revealing the names of women, adult women, rape victims, much less having them act it out on camera. I find subjecting a child to that is totally offensive.

I mean if that were my own daughter, I don't know what I would do. It serves no—it has no value. It serves [13] no purpose besides further the claims of Dr. Morgan, which have not prevailed in Court, and it's completely abusive of Hilary's rights.

THE COURT: Thank you.

MR. LEVINE: Your Honor, Lee Levine appearing specifically for the defendants. I'd just like to make a few points that do not go to the substance of the broadcast.

First, as Your Honor has pointed out, I have severe questions about whether there is any standing here. When you are asking for the kind of extraordinary relief that we're talking about here, the guardian is not present in the courtroom.

THE COURT: Can't I appoint a guardian?

MR. LEVINE: I suppose the Court has the power to do that. However, there has been no indication that anyone acting on behalf of the child has suggested that this broadcast should be enjoined.

THE COURT: Well, the father. You don't think a father has an interest?

MR. LEVINE: I think the father has an interest, but I also think that there has been a guardian appointed. The guardian is not here.

THE COURT: But that guardian is appointed in another matter. I think I have the right with the father

coming in here and saying that the child's interests are being abused, [14] but I mean that's pretty bad stuff.

MR. LEVINE: Your Honor, that stuff has been broadcast on several prior occasions. A prior restraint here would do absolutely no good to protect the interests that they are seeking to protect here.

THE COURT: How did you get the video?

MR. LEVINE: From my client.

THE COURT: And who did your client get it from?

MR. LEVINE: From Dr. Morgan.

THE COURT: Who?

MR. LEVINE: From Dr. Morgan, who is the child's mother.

THE COURT: Boy.

MR. LEVINE: Your Honor, this same information, this same exact broadcast was broadcast in early March all over the United States on this cable network. Before that broadcast, as the declarations that we've submitted demonstrate, Ms. Mittleman was in contact with the cable company.

THE COURT: The fact that it has been broadcast once, does that mean that the child doesn't have a right after that? I mean, here's the problem as I see it from your standpoint. Here you have an innocent little babe, a child, who I'm just wondering in the interest of that child should this be broadcast? And I don't see how the mother can exercise those rights for that child. I really—I must tell you that I am very [15] troubled by this.

MR. LEVINE: Your Honor, I would submit that to the extent that the Court is troubled, there are legal remedies involving subsequent awards of damages that are available. The law of prior restraint is very clear, that once publication has been made, especially in this case. We're not talking about simply one prior broadcast, albeit nationwide of this particular program—

THE COURT: But then what you're arguing is there has been no prior restraint. It's been broadcast once. But are you saying to me that if there is after a trial

and the child's rights are so paramount that this thing should not be broadcast again that a Court can't issue as part of its relief an injunction?

MR. LEVINE: I think under the circumstances of this case, I would say you cannot, Your Honor. I would say that in the first place the information has been broadly disseminated already. Second of all, the domicile of this plaintiff is the Commonwealth of Virginia, which does not recognize the tort of invasion of privacy.

Second of all, even if it did, there is a well recognized exception to the tort of invasion of privacy when the matter broadcast is of public interest.

THE COURT: That's a public interest?

MR. LEVINE: Your Honor, Ms. Mittleman referred to [16] the concern over the identity of the publication of names of rape victims. The Supreme Court last term in the Florida Star versus B.J.F. case, specifically said, so long as it deals generally with matters—

THE COURT: Well, let me tell you what I think I've got to do here before I make a decision. I want to appoint somebody in the interest of this child, and we got to do it quickly, I realize. When is this supposed to be broadcast, tonight?

MR. LEVINE: This evening, Your Honor.

THE COURT: Well, let me—I don't know who to appoint. I mean this is going to be a pro bono situation obviously. I can't pay anybody, but I do want to hear somebody with the interest of the child, other than with the respect to the plaintiff here. But I have to get somebody. We'll have to schedule this for later this afternoon.

MS. MITTLEMAN: Your Honor, may I make one point?

THE COURT: Surely.

MS. MITTLEMAN: These cases have had a lot of jurisdictional questions and although it is true Dr. Foretich resides in Virginia, I would say that Hilary, although she's in New Zealand now, her residence, at least it was before she was abducted away, it was the

District of Columbia, so this is where the Courts have dealt with her.

THE COURT: Who is a prominent preeminent First [17] Amendment lawyer in this city that I could appoint?

MR. LEVINE: Your Honor, I'm trying to think of one.

THE COURT: I know of Abrams in New York.

MS. MITTLEMAN: That's what I was going to say.

THE COURT: But I think he might have a conflict.

MS. MITTLEMAN: A lot of major firms are already involved.

THE COURT: Griswald, and he's here in town; isn't he? Maybe I could call him.

MS. MITTLEMAN: That firm would not have had any conflicts in this case.

THE COURT: P. Griswald. Anybody in the schools around here?

MR. LEVINE: Your Honor, may I make a recommendation?

THE COURT: Sure.

MR. LEVINE: Barrett Prettyman at the Hogan and Hartson firm.

THE COURT: He's good.

MR. LEVINE: He argued the Nebraska Press Association case in the Supreme Court.

THE COURT: Okay. Let me see if I can get somebody in her interest.

MS. MITTLEMAN: Your Honor, I think that's an excellent suggestion. I would support that.

THE COURT: How about Lloyd Cutler?

[18] MS. MITTLEMAN: Wilmer, Cutler, Pickering is Dr. Morgan's attorney.

THE COURT: Oh, I'm sorry. He's Morgan's attorney.

MS. MITTLEMAN: Does the name of Kevin Bain mean anything to anybody?

MR. LEVINE: Your Honor, the problem I'm having is that most First Amendment lawyers in this town are

engaged in litigation with Ms. Mittleman on behalf of Mr. Foretich defending various—

MS. MITTLEMAN: Which leads me to a point that I was also hoping to make, which is that I agree that normally damages after the fact, that's the standard First amendment thing, but we'll be suing from now until doomsday.

THE COURT: That's just pretty rough stuff, and my point is that if this kid has any rights, they ought to be—whatever, they ought to be protected. Again, I'm not the First Amendment authority. I might become one after this case, but I do know from the little that I've read, that the Courts do take some great pains when a child is involved. And, indeed, they have passed all kinds of legislation protecting children.

The FCC doesn't allow certain shows at certain times, so we do have a very delicate matter here, which has got to be protected.

MS. MITTLEMAN: On that point, it occurred to me that since this was produced by the BBC, I wonder if a domestic [19] company may not have even been willing to put that on the air. I mean, that may be—

THE COURT: Well, what's that mean? I—

MR. LEVINE: Your Honor, may I have a word?

THE COURT: Surely.

MR. LEVINE: If the Court feels most comfortable appointing a guardian, obviously that's fine with the defendants. But may I respectfully suggest that even assuming that Hilary—that there is an invasion of privacy here and that Hilary has an interest that is due to be protected, I must respectfully submit that this Court simply has no authority to issue a prior restraint.

Ms. Mittleman's—the basis for her claim that the prior restraint doctrine doesn't apply is that this is child pornography under the Ferber case. The Ferber case, which we have submitted a copy to the Court, makes two points—

THE COURT: Look, believe me, I understand prior restraint a little bit. But I am not convinced that when a child is involved, when a session—when she's involved with a doctor, and that doctor videotaped that which whether she was agreeable to that or not, I don't know. And then when they use that videotape for purposes other than it was designed for and to say that that child does not have an interest—

MR. LEVINE: I'm not suggesting that the child doesn't have an interest.

[20] THE COURT: Let me ask you. Suppose there, for example, there was a parent put a kid into prostitution, a youngster what, four years old. Are you saying—and then they took pictures of the kid. Are you saying that that child would not have any interest in having her rights vindicated?

MR. LEVINE: I'm not suggesting that at all.

THE COURT: Are you saying that a prior restraint would not lie there?

MR. LEVINE: If we were here in the District of Columbia, Your Honor, and the District of Columbia or Congress passed a statute that empowered Courts to issue prior restraints pursuant to a specifically defined kind of sexual act that constituted in the judgement of the legislature child pornography, the Ferber case would say that there was no First Amendment protection and that an injunction could issue.

But the Ferber case says—

THE COURT: I'll appoint you as guardian. You made a very powerful argument.

MR. LEVINE: The Ferber case says in the absence of a legislative enactment specifically defining child pornography and in the absence of the kind of definition of child pornography that you just described, a child engaging in actual sexual conduct with lewd exhibition of the genitals and that sort of thing that a Court does not have power to override the First Amendment protections at stake.

[21] THE COURT: I don't understand why—how does a statute amend the Constitution? Why is it that a statute can be so powerful, but a Court's decision cannot be as equally as powerful?

MR. LEVINE: Because, Your Honor, the Ferber case, which is the case upon which she relies, starts from the premise that the explicit sexual conduct depicted in that case did not rise to the level of obscenity if it had been adults involved. And the Court was asked to address the question of can it nevertheless be penalized, and I should point out that's not even a prior restraint case. That's a subsequent punishment case, but the Court was asked to decide whether, even though it didn't rise to the level of adult obscenity, could it still forfeit its protection under the First Amendment, and the Court said, yes, but only under one circumstance, where a legislature has thought about it and defined it and declared it.

THE COURT: All right. Let me—we will reschedule this for 5:00 tonight, and I hope you'll be in touch—who is handling this? David or Susie, are you handling this? Either David or Ms. Cohen will be in touch.

Let me take a few minutes. I want to see if I can get one of these people. Is Prettyman—are both of you satisfied with Prettyman or Griswald?

MS. MITTLEMAN: Yes, Your Honor.

[22] MR. LEVINE: Fine, Your Honor.

THE COURT: All right. Thank you.

(Brief recess.)

THE COURT: We're back on that case. Let me tell you what I've done. I've appointed Mr. Nathan Lewin of Miller and Cassidy as the guardian ad litem, but we have to get all the documents over to his place immediately. So who can—including the tape. Who can—

MR. LEVINE: We can take it over.

THE COURT: Would you do that?

MR. LEVINE: There is only the one copy of the tape.

THE COURT: Could you do that? We got to call—who do we have to call? We have to call Ms. Mittleman to tell her, and I don't mind either one of you filling him in. I don't have any problem with that.

MR. LEVINE: Is he expecting us?

THE COURT: Well, would you call him and tell him? He's expecting all the papers. The only thing is to get them over as quickly as possible.

(Recess from 10:45 a.m. until 4:20 p.m.)

THE DEPUTY CLERK: Eric A. Foretich, et al. versus Lifetime Cable, et al., Civil Action 90-796.

THE COURT: Mr. Lewin, as the first order of business, do you have any objection of my appointing you guardian ad litem in this case?

[23] MR. LEWIN: No, Your Honor, I have no objection.

THE COURT: All right. And I want to thank you so very much for being willing to take the appointment in the best traditions of the legal profession on an absolutely pro bono basis.

Now, I guess I want to hear from you. I've heard from the other parties today. You're the only one I haven't heard from.

MR. LEWIN: Well, Your Honor, just let me say that since I was advised this morning by Your Honor, I have met with the counsel for the parties who were kind enough to come to my office and provide me with the documentation and with the film regarding this particular action, and I had a brief telephone conversation as well with Dr. Froning, who I think the defendants have an affidavit that they are filing with the Court from Dr. Froning and she told me that in substance on the phone as well.

Let me say to Your Honor that—

THE COURT: Who is Dr. Froning? Is she in the picture?

MR. LEWIN: Yes, she's in the picture. She's the psychologist who apparently examined—

THE COURT: Let me just read this for a second.

(Brief pause.)

THE COURT: Fine. Thank you. I've read it.

[24] MR. LEWIN: And let me just say, Your Honor, that in the limited time, of course, that I have had since being advised this morning and appearing here this afternoon, I have viewed it as being my function in terms of being appointed by the Court to represent the interests of Hilary, not to really make any evaluations or judgments of as it were the global battle, which I cannot do certainly within the limited period of time that's available,—

THE COURT: Neither can I.

MR. LEWIN: —the battle between Drs. Foretich and Morgan.

THE COURT: That's why you've been appointed. I need somebody who is going to represent this child.

MR. LEWIN: Yes, Your Honor.

Well, let me say that having viewed the film and having considered the law in the area, I believe on behalf of Hilary that the Court should issue an order enjoining the showing of at least what amounts to I think two and a half minutes of this film, because there are two and a half minutes of it which I believe do invade the privacy rights of this child, and which I think under existing law there is authority for the Court to issue an order that would enjoin the showing of those two and a half minutes and there are another approximately minute and a half where the child or her voice appears in the film, and which I must say is not as invasive of her privacy [25] rights, but nonetheless, I think certainly does her no good, and in the long run may prove to be embarrassing to her, which on her behalf, I would also request that the Court enjoin, but not with the compelling nature, I think of the two and a half minutes.

THE COURT: What was the other minute? The one I saw, the one that bothered me extremely is the one with the mentioning of the private part of the human being and telling where that part gets placed. That to me—

MR. LEWIN: Yes, Your Honor, that is—

THE COURT: That's the part you're agreeing to?

MR. LEWIN: No, that I believe ought to be enjoined.

THE COURT: Yes.

MR. LEWIN: Yes, definitely. That's I think the most clearly invasive of her privacy rights. They are really three separate little segments which are just tied together I think by narration of Dr. Morgan in between, first a minute and approximately 38 seconds, then approximately 46 seconds and then approximately 35 seconds, all of which take place apparently in the psychologist's office, and I must say under circumstances which indicate to me from the introductory statements that the child believed she was in privacy with her mother, that there was nobody else who was watching at the time.

She had asked that the doctor leave and everybody [26] else leave, and I think she was not aware that this was being videotaped. Consequently, she was engaged in what was a private conversation which to this four year old was a conversation with her mother.

She then described using dolls in some graphic detail what I thing she was recounting was episodes with her father. First, an episode that she had with her father, then an episode, the second portion, that her sister had with her father, and then the third again with her father. Those are I think particular events which I must say given today's technology, if this were to go out on public—I understand it's been shown one time, but it gets more publicity I think every time. If it goes out on television, there is, of course, the facility for anybody in the world to tape it. If appears on public television. It appears on television to the public.

So anybody can record it, and simply this recording of these very private moments that this four year old had

with her mother, I think would be available 10, 15 years from now to haunt her at any time that she goes, any place that she goes. People can play this recording back to her where she thought she was speaking privately with her mother.

Consequently, I believe that in her interest, her privacy interest, I know that the plaintiff has made a claim based on obscenity or pornography. Our view on behalf of Hilary is that there is quite a different rationale here, which [27] is one of privacy interests that would entitle the Court I think under the prior restraint cases.

There is a very strong line certainly of cases that say that Courts may not issue prior restraints, but what they cover are by and large matters of political discussion or of public attention. There is a very fine discussion in a case called Husky versus National Broadcasting Company in the Northern District of Illinois decided in 1986 by Judge Shadur, if that's the way he pronounces his name, S-H-A-D-U-R, and particularly pages 1294 through 1296. There is a discussion of the availability of injunctive relief, prior restraint when there is an invasion of privacy.

In addition, there was a celebrated instance involving a film called Titticut Follies, which was a documentary of events at Bridgewater State Hospital, where the State of Massachusetts successfully obtained an injunction against the showing of that film, because it invaded the privacy of the inmates of the institution. The Supreme Court denied certiorari. The case is reported at 249 Northeast 2d. 610, and the denial of certiorari is at 398 US 960.

And if I had to find parallel situations, there are parallel cases where even the Court of Appeals for this Circuit directed that portions of tapes that were publicly available and that there was a public interest in be redacted so that privacy not be invaded.

[28] Specifically at the time of the ABSCAM cases, there were, as I'm sure Your Honor will recall, there

were tapes that were taken of various Congressmen and others who were charged and convicted, and the Court of Appeals here said in a case reported at 653 F. 2d. 609 at page 619, when it authorized that they be made public, that the possible injury to innocent third persons is a factor that may properly be taken into account by the District Court in passing upon applications to copy and make such records public, and that, therefore, it would be appropriate to require that wherever there would be an invasion of injury to innocent third persons that the tapes be redacted or amended so that those portions are removed.

And on the basis of those authorities, it appears to us, it appears to me as counsel for Hilary, that there is ample authority for this Court to say that when there is an invasion to privacy and when it can be very specifically designated what it is that has to be removed from the film because of the invasion of privacy, this Court can issue an order that says that those portions that relate to Hilary should be enjoined.

The rest of the firm is a matter of public interest. The parties are there, but at least those portions that relate—that show her in there very private moments with her mother discussing these matters we think should be enjoined, should not go out to the public, because it would harm her privacy interests.

[29] I think the fact that she's not in the United States today is a factor that certainly lessens the interest somewhat, but I think the fact that this is available generally is going to harm her in the future, and, therefore, as an attorney who is here and is not obviously able either to speak with my client, but nonetheless, trying to present to the Court the interests on behalf of this child, I think that there is authority and basis for issuing such an injunction, and I would request that it be done.

THE COURT: Have you drafted papers along those lines, Mr. Lewin?

MR. LEWIN: Unfortunately, given the time, we have not.

THE COURT: All right. I want to hear. I'm just saying in case I issue it whether—all right. The first time I think I've ever caught you asleep.

Go ahead.

MR. LEVINE: Your Honor, a few housekeeping matters first. With me at counsel table at the end of the table is Larry Scharff, who is a partner in the Reed, Smith firm here in Washington.

THE COURT: Pleased to have you.

MR. LEVINE: He's general counsel to the Radio, Television News Directors Association and they are here. Given the short notice, they haven't had a chance to file any papers, [30] but they are here as amicus in support of the defendants.

In addition, we've handed up to the Court and filed with the Clerk this morning two declarations, one that Mr. Lewin referred to from Dr. Froning and the other one from Mr. Lambert who is the producer of the program in Britain.

I'd like to spend a minute talking about what is in those declarations because I'd like to emphasize to the Court that the moving parties here, Mr. Lewin, because of the shortness of time, Ms. Mittleman for reasons I don't quite understand, have made absolutely no, zero, evidentiary showing, other than the fact that we brought the broadcast and showed it to the Court.

We seem to have been focusing on one question here which is the question of whether—

THE COURT: I would think that the father has some rights as to his daughter. I mean if you can't understand it, I'll explain it to you.

MR. LEVINE: No, no. I can't understand why they've made no evidentiary showing when they are asking for the extraordinary relief of an injunction and that's my point. And the point that I am trying to make, Your Honor, is that we have provided to the Court an

affidavit from a psychologist who has examined Hilary on some 80 some odd occasions who is of the view clinically that there is nothing wrong with this broadcast and it is not invasive of her privacy, and I would ask the [31] Court to pay due regard to that.

Your Honor, the trouble that I've had with this proceeding today is basically the Court has reacted, Mr. Lewin has reacted, I think many reasonable people react to this broadcast by saying, this is offensive. I don't like it. I wouldn't broadcast it. I don't think it should be shown.

With all due respect to Mr. Lewin and to all the rest of us, unless there is a legally cognizable cause of action that empowers a Court to say I can make the decision for the editors in this case, and I can decide and not leave it to the editors under the First Amendment to decide whether this should be broadcast, and unless there is a legally cognizable cause of action that authorizes a prior restraint in this setting, I think that there isn't much any of us can do about it, other than leave Hilary and Dr. Foretich to their remedies at common law.

THE COURT: You see, the problem you have is how you phrase the issue. And it reminds me of the story that Justice Scalia once said—once told about he was in a—a young priest who liked to smoke was talking to another priest who also liked to smoke, and he asked the priest, he said, well, you know, I don't understand how you get away with this. When I'm smoking, the Father in charge tells me I can't do it. And he says, what you did, he says, you asked the wrong question. [32] He said, what happened, you probably said, is it all right to pray while I'm smoking, and what the question should be is it all right to smoke while praying. And so you see, you get to the point of how you ask—the other thing is is the glass half filled or is the glass half empty.

The point that I'm trying to make is and I think what Mr. Lewin, who I think you know, I asked him

this morning to come in as objective as he knew how. I don't think we spoke more than a couple of minutes because he said he was busy doing a lot of other things, and he said, just get the papers over. And I told both of you to go over and talk to him as much as you like.

But the concern I have is really not with the first amendment. The concern I have is with this young child. If you start asking what is in this child's best interest, and it seems to me that this child's rights have been—possibly been extremely violated here. The child doesn't know what's going on. What can this little child consent to?

Let's assume some pornographer went out and took pictures of this, as I mentioned to you this morning, and to say that there is no way to remedy a situation such as that and to say that the First Amendment rears its wonderful head and says that that is not—cannot be dealt with is terribly, terribly troublesome. That's the problem I have with this case. It's the child's interests and the child's rights and [33] for—I cannot see how, and I'll give you your opportunity, but how is the interest of this child being protected here?

And let me just go one step further. Let's just go with me along this line. Let's suppose we have, as we do here, a full lawsuit, and let's suppose that this child is now suing to have her rights vindicated, and let's suppose that a Court should find that her rights have been violated.

Now, are you trying to tell me that at the end of that trial and case, and a Court is saying I'm going to issue relief, to say that that child can—I think you would agree would be able to get some money damages from somebody, but to say that you couldn't withdraw that film from the public view, I think that would be in keeping with our traditions in the law. That is a proper measure of an equitable relief and could be granted as damages or conceded as damages by the Court.

That's the way that I see it, and I don't see it as this—how is the First Amendment vindicated here by showing this tape?

MR. LEVINE: Your Honor, let's put the First Amendment aside for just a second and go with just your hypothetical. We have a lawsuit. A complaint comes in. Let's say it alleges invasion of privacy, and I come in here and I bring a motion to dismiss. And I say to Your Honor, Your Honor, the District of Columbia—let's assume Hilary lives in the District of Columbia and the District of Columbia is involved [34] here.

The District of Columbia has issued a decision saying that we don't recognize the tort of invasion of privacy. That's what the District of Columbia Court of Appeals has said. I think in that situation you have to say, gee, I think this is terrible and I think it is really bad that Congress—

THE COURT: I said we've been talking invasion of privacy, but I don't think that that is the sole cause of action that we're talking here. You're talking about giving something a label. I don't know, again, what my point right now is that I've got before me is really a restraining order question, because I want to consider these issues, but I don't know if I have to now phrase this in terms of whether it is invasion of privacy or whether it is some other kind of tort that's like defamation or a tort that is an assault on this young child.

I don't know how if this young child had been taken out and hit by somebody, there would be an assault and a battery. Now, when this child is now being whacked by a person who has, in effect, invaded her most sacred kinds of things, that's terrible.

Let me ask you something. Suppose this doctor had told her to undress, and suppose he had asked her to demonstrate and graphically use instruments to demonstrate. We gave her a penis to actually demonstrate. Are you trying to say to [35] me that this Court could do nothing about that? I'm not saying it's obscene or

pornographic, because obviously if you are trying to demonstrate something like that, that would bother me.

MR. LEVINE: Your Honor, it would be hard for me to deal with that hypothetical in the abstract, because I have a hard time knowing how an editor could make what would be a decision that that would be worth broadcasting, and secondly, if it did, under the invasion of privacy tort, as I understand it, how it could shelter under the newsworthiness, public interest exception to the privacy tort.

In this case, and I think it's something that needs to be said, and it's said in the affidavit of Mr. Lambert that we have submitted to the Court. The issue of whether those sessions, of whether Hilary's testimony that she has been abused was coached in those sessions or whether they were given of her own free will and were due to be credited has become a major issue in this dispute between the parents.

I don't want to get into the dispute between the parents either, but I think that given the intense public attention that has been given to this matter, including broadcasts of this program before and other programs and written material that has described these sessions in great detail that this Court cannot say that a prima facie case of invasion of privacy has been made out.

[36] THE COURT: Let me give you another hypothetical. Suppose—as I understand it, this was supposed to be utilized in the trial. Am I wrong on that?

MR. LEVINE: I think it was. I don't know.

THE COURT: Now, are you saying that if a Court took this at a trial, an open trial, that a Court could not have put a protective order and said that they were not going to permit that to be shown? I mean other than to the immediate fact finders. Of course, a Court could have done that.

MR. LEVINE: But that's a very different situation, Your Honor. That's a situation where the Court is

being asked to affirmatively grant rights of access to information that is in its possession because it's a Court. There is a much lower level of First Amendment protection granted in that situation than there is to when someone has independently and totally lawfully gotten the material and someone is trying to restrain them from publishing it or broadcasting it in advance.

THE COURT: I'll tell you what I'm going to do here. I believe I don't have enough data or information, and I will—I don't know. Because I think you do raise a good issue of the question of how are we going to label whatever this cause of action. But I do believe there is enough here to issue a TRO, and I'm going to issue a TRO for 10 days, and I'll set it for trial.

I want to get all of these for a preliminary [37] injunction, but I would like to get all of these matters squared away, just exactly what is the—I believe there is a cause of action. I don't know how to be able to—how the parties are going to be able to articulate it. I do hope that perhaps some more information can be obtained as to how this occurred, and getting probably testimony from the mother and the father and how they feel that this is in the interest of this child.

And I must tell you that, while I believe that the First Amendment has virtually unlimited bounds, and I am a very strong believer in the First Amendment, I think that in this case it has been exceeded. I must tell you that I just—those bounds have been exceeded, and, therefore, I am going to issue the TRO, and I believe there is the strong likelihood that the parties will prevail because I believe this is in the interest of this child, and I will set this down for a hearing in 10 days.

Do I have a date? And I don't believe that your organization will be hurt one bit if you just wait until we get this thing litigated.

Mr. Lewin, are you going to be able to stay in on this?

MR. LEWIN: Your Honor, as I advised the Court, I am now personally in the middle of a trial in Los Angeles.

THE COURT: You personally?

[38] MR. LEWIN: It will be—I think it will be concluded in two weeks. Either I or somebody else from my firm will handle it.

THE COURT: Good. Just let me know who that is.

MR. LEVINE: Your Honor, I know you've entered your ruling. There was—at least for the record, I'd like to get in one other thing, if that's permissible.

Ms. Mittleman alluded to it this morning. I'd like to hand up to the Court a copy of the decision issued by Judge Gesell two days ago. In that decision, Your Honor, Judge Gesell dismissed an invasion of privacy claim brought by Dr. Foretich against Glamour Magazine on the grounds that the State of Virginia in which Dr. Foretich lives does not recognize the cause of action, and under District of Columbia choice of law rules, it is the Virginia law that applies.

I would argue just for the record that that ruling should control this case and that there should be no cognizable right to privacy.

THE COURT: Well, I'll read it. Again, all these things, and I have a great respect for Judge Gesell. It's unusual that we would see things differently, but I don't know whether this is the same type of case.

MS. MITTLEMAN: Your Honor, I'd like to respond to what he said.

THE COURT: Well, I will in just a second. Just give [39] me a chance here. That I am not making any final decisions at this point. I am giving you what I believe that I think when I balance the interest of the young child and I balance the interest of the First Amendment, and of your client, I believe that I am compelled to give the child's interests the higher priority here and to put a TRO on it as this time until this matter can be further fully explored.

What did you want to say? You've been quiet and I think you have a right to say something.

MS. MITTLEMAN: I'll just be very brief, but in terms of the invasion of privacy, Your Honor is correct. We have not mentioned anything about a tort. We have not couched it as invasion of privacy. But Dr. Foretich is a resident of Virginia. As I said this morning, Hilary is presumably a resident of the District of Columbia, which does have the tort of invasion of privacy. The Vaciliatis case is well known.

THE COURT: Well, this is going to be a nationwide, and I assume there has got to be an invasion of—if that's the tort, there has got to be somewhere in this country where that applies.

MS. MITTLEMAN: I'm saying that relying on Judge Gesell's opinion based on Dr. Foretich's residency in Virginia. It's not our point.

THE COURT: I understand. At this point, I am issuing a TRO.

[40] MS. MITTLEMAN: I'd like one more thing. In terms of the evidence, I don't know if the tape was introduced into evidence. If so, I don't know if you would want to introduce it in—

THE COURT: Yes, the tape will be in evidence as your Exhibit 1 and as the guardian ad litem's Exhibit 1. I will enter into evidence both of these declarations.

(Plaintiff's Exhibit No. 1 marked for identification and received in evidence.)

MR. LEVINE: Can we also—

THE COURT: But I do think that I would like to see some testimony. I would like to hear from the mother as to how she believes that this is in the best interest of this child as opposed to being in the best interest of herself. I would like to know, and I think these have all got to be resolved at the hearing. I think that we need some experts, quite frankly, other than experts who have an interest in this matter.

MR. LEVINE: Your Honor, in—

THE COURT: Wait a minute. Another thought I just had, I would like to know how the mother—I mean how this whole thing was arranged and why it was, in fact, given, something as private as this turned over to the media. To make a circus out of this thing? I really must—you got me really worked up now, but I really must tell you that I can't see how this is much different than—not that this is child [41] pornography, but different than a child pornographer that goes out and abuses a little child. I really don't.

While motives might be different, the effect is the same on this little child. And, you know, as I review that, the business of cutting off this child's face is absolutely brutal. I think it adds to the terrible impression you get from this film. I mean that was particularly bothersome.

By the way, I'm going to limit it only to that first—to the part that I saw. I assume you know what it is. The part that involves where you put that thing. All right. Does that properly describe it or is there some—

MR. LEWIN: Well, Your Honor, I guess I was speaking of that part, and then I mentioned there was another part, and I guess the proposed order that the plaintiffs had submitted related to any part in which Hilary is shown. Now, I assume they—there are photographs of Hilary. I think photographs of Hilary have been generally available, but there is another portion where again her face is as Your Honor has said is sort of blocked out where there is a social worker who comes to the house to take her for visitation with her father.

THE COURT: I didn't see that.

MR. LEWIN: That's in the film.

THE COURT: I know. But you got to understand. I didn't have 40 minutes today to see it. I didn't have your luxury, Mr. Lewin.

[42] If you want me to look at that, I'll look at that at this time, but I did not see that part. The part that I saw was the part that you saw.

MR. LEWIN: Well, I don't know whether the defendants will be playing this film if that portion is removed or whether the choice is that the entire film will not be played without it. If so, that question may be moot. On the other hand,—

THE COURT: Describe what you saw that you didn't like, and why you didn't like it.

MR. LEWIN: Well, because what happens is she is sitting there in her mother's lap. The social worker says, you know, I've come to take you for your father. She starts crying. Her face again is sort of blocked out. She's crying. Then there is the scene—what happens is it pans away from that particular view. She continues to cry in the background while Dr. Morgan is describing the fact that she went through great turmoil in terms of permitting her child to go through this. So you have the voice of Hilary in the background.

It is not, as I say, as offensive as the other portion, not as much of an invasion of privacy, but, again, if I was viewing it from the child's interest, which Your Honor has instructed me, then—

THE COURT: All right. I'll order that other part, and if it is reversed, it can be reversed from that. But the key to this is again, I hope you folks understand what I'm [43] saying that I'm looking that if there is such a cause of action, which I believe there is, and at the end of the case, I believe that I would be entitled to say that that document should not be shown any more, even if it had been shown 100 times out there. That I believe that that is enough to—now, I could be wrong.

But that's where I am, and does somebody have a piece of paper for me to sign?

MR. LEVINE: Your Honor, before you irrevocably put pen to paper on this, may I think in fairness to

the Court because of some comments you made, I need to make a couple of comments.

Dr. Froning who executed the affidavit who was the person who gave permission to give the tapes for use in this documentary and advised Dr. Morgan that that would be a good idea is here. She—

THE COURT: What?

MR. LEVINE: She is here.

THE COURT: She's here?

MR. LEVINE: Yes.

THE COURT: Well, why didn't you put her on the stand?

MR. LEVINE: If you want to, I'll be happy to do that. Also, Dr. Foretich is here. Dr. Morgan who you alluded to is in New Zealand, and I don't think she's going to be here [44] in the next 10 days.

THE COURT: Well, I would like to have those people, but we'll do that at the preliminary injunction. At this stage, it's 10 minutes to 5:00. I promised Mr. Lewin, who has some religious beliefs that he has to satisfy tonight that I would not tie him up that long, and I assume you are going to try to appeal this, and so, therefore, I think if the Court of Appeals wants to send it back and you can keep these people here to take some testimony, I'll be prepared to take testimony. Do you have somebody from your office here who can—

MR. LEWIN: Yes, I have my partner, Mr. Braga, is here.

THE COURT: And I know him well. The child will be ably represented.

MR. LEVINE: I just feel that I need for the record, Your Honor, to make it clear that she is here and is available.

THE COURT: I know. But I wish you would have told me before.

MR. LEWIN: Your Honor, if it is going to take another 20 minutes or half an hour, I can be here. I mean, I don't mind, if Your Honor wants to have—

THE COURT: Well, if you feel that—do you want to introduce some testimony?

MR. LEVINE: Your Honor, my feeling is—

[45] THE COURT: Well, put your witness on.

MR. LEVINE: All right.

Now, did I understand Your Honor to say that you would be enjoining this other portion?

THE COURT: No, I'm not going to be enjoining anything. I'm going to hear testimony.

MR. LEVINE: I understand that. But if you were—I didn't understand the result of the last colloquy before we got to this testimony.

THE COURT: Well, let me just hear this testimony.

MARY FRONING, DEFENDANTS' WITNESS, SWORN

BY MR. LEVINE:

Q. Could you state your name for the record please?

A. Dr. Mary L. Froning, F-R-O-N-I-N-G.

Q. What is your occupation, Dr. Froning?

A. I'm a licensed psychologist.

Q. Can you tell the Court a bit about your educational background and training?

A. I received a doctorate in clinical psychology and then began to specialize in children and families and finally in child sexual abuse, which has been my field since 1984.

Q. Where are you currently employed?

A. I'm in a group private practice in Silver Spring, Maryland.

Q. Are you familiar with the Chesapeake Institute?

[46] A. Yes, I began working there in February—excuse me, August, 1984.

Q. And how long did you work there?

A. Until January of 1989.

Q. In what capacity?

A. I was the senior staff psychologist.

Q. What did you do as senior staff psychologist of the Chesapeake Institute?

A. Chesapeake Institute is a center for the study, evaluation and treatment of child sexual abuse. I did research, performed evaluations and treatment of all people involved with child sexual abuse, offenders, child and adult victims and other family members.

Q. Did you during that period at the Chesapeake Institute have occasion to examine and treat Hilary Foretich?

A. Yes, I did. I began to see her in January of 1986.

Q. How long did you see Hilary?

A. I saw her continuously between January of '86 and August of 1987 for a total of 87 sessions.

Q. Were you her treating psychologist?

A. Yes, I was.

Q. Did there come a time when you were contacted by someone named Steven Lambert?

A. Yes.

Q. Who is Steven Lambert?

[47] A. Steven Lambert is the producer for Hilary in Hiding of the BBC.

Q. That's the broadcast that you understand to be at issue today; is that correct?

A. Yes.

Q. Could you tell the Court a little bit about the circumstances under which you made available to Mr. Lambert the videotapes that have occupied our attention here this evening?

A. Yes. Mr. Lambert came to me first in the summer of '89 and then for I think production reasons things got cancelled, and then came back to me in the fall of '89. In order to better understand this case, he wanted to talk to Hilary's treating therapist, and I spoke with him at length.

At some point in time, I don't recall exactly how, the existence of the videotapes became known to him, but

he knew of them and I told him that I thought they were helpful to the understanding of the case.

Q. Before we get to that, Doctor, how is that you felt that you were professionally permitted to be having discussions with Mr. Lambert about one of your patients?

A. I had a release from Dr. Morgan, who is Hilary's legal custodian. We updated that every six months to make sure that she continued to believe that was in her child's best interest.

MR. LEVINE: Your Honor, may I approach the witness with a copy of the consent forms?

[48] THE COURT: You certainly may.

MR. LEVINE: Could I ask that it be marked for identification as Defendant's Exhibit 1, I guess.

(Defendant's Exhibit No. 1 marked for identification.)

BY MR. LEVINE:

Q. Could you describe for the Court what Defendant's Exhibit 1 is?

A. There are two releases. One is—they are both executed by Dr. Elizabeth Morgan, one for Hilary and one for Dr. Morgan herself.

MR. LEVINE: Your Honor, I'd like to move the admission of Defendant's Exhibit 1.

THE COURT: Admitted into evidence.

(Defendant's Exhibit No. 1 received in evidence.)

BY MR. LEVINE:

Q. When you talked to Mr. Lambert about providing him with copies of the tapes, what—did you tell him that he had your permission to use the tapes?

A. At the point at which we were discussing it, it was only to help him understand the case. At some point in time, and he was—asked to view them with me. Unfortunately, I was unavailable. So Dr. Morgan picked up the tapes. They were in my possession and viewed them with Mr. Lambert. At some point [49] in time then there was a decision made to use them in the broadcast.

Q. Did you give your permission to Mr. Lambert to use the tapes in the broadcast?

A. I don't believe specific permission, but through Dr. Morgan it came to be agreed that they would be helpful.

Q. And you had no problem with that?

A. I had no problem.

Q. Why did you believe that it was appropriate to use the tape recordings in the broadcast?

A. I need to add that it was with the expressed reason that permission was given only if Hilary's face were shadowed, and that was because that at the time she was still in hiding and I did not want to in any way provide help for hiding—for finding Hilary.

THE COURT: What was this? Are you telling me she was still in hiding, and you knew she was in hiding?

THE WITNESS: Everyone knew she was in hiding.

THE COURT: But you knew where she was?

THE WITNESS: No, no, no, sir, I did not. But I didn't want her picture—these were films that were taken in 1987, before she went into hiding.

THE COURT: Oh, I see. Before she went into hiding.

THE WITNESS: Yes.

BY MR. LEVINE:

[50] Q. Why did you believe it was appropriate to use the tapes in the context of this documentary?

A. It's my position that in order for people to protect Hilary, they need to believe her story, which she tells pretty ably in those videotapes, that she is a sexually abused child. And I don't think people can understand that other than hearing from Hilary herself.

Q. Has there been some problem from your perspective with the credibility vis a vis others of Dr. Morgan when she tells Hilary's story or when others tell Hilary's story?

A. Right. The typical story of, you know, he says this and she says that has left people totally confused I think.

Q. Doctor, have you talked to Hilary about the issue of whether or not events—the events depicted on the videotape or others like them concerning her should be publicized?

A. I had one conversation with her about it.

Q. Did you make notes of that conversation?

A. Yes, I did.

MR. LEVINE: Your Honor, may I approach the witness.

THE COURT: Yes. Now, who did you have the conversation with?

THE WITNESS: With Hilary Foretich.

THE COURT: When was that?

THE WITNESS: August 20 of 1986 when this case first became public.

[51] THE COURT: These tapes became public in 1986?

THE WITNESS: No, the case did, because her mother went to jail the first time in August of 1986.

THE COURT: And you saw her when?

THE WITNESS: I started seeing her in January and continued to see her until she went into hiding.

THE COURT: In 1986?

THE WITNESS: Right. All through 1986 and part of 1987.

THE COURT: And you had a conversation with her?

THE WITNESS: About publicity.

BY MR. LEVINE:

Q. I've handed you what I've asked the Court to mark for identification as Defendant's Exhibit 2. Can you identify that document?

MS. MITTLEMAN: Judge Dickson has taken extraordinary measures over these years to keep Hilary's

privacy maintained, and it is my understanding that this type of material is under seal in the D.C. Superior Court.

THE COURT: And it will remain under seal here. You have no problem with it being placed under seal?

MR. LEVINE: With the notes I have no problem.

THE COURT: What?

MR. LEVINE: I have no problem that the notes are under seal.

[52] THE COURT: Admitted into evidence under seal.

(Defendant's Exhibit No. 2 marked for identification and received in evidence under seal.)

BY MR. LEVINE:

Q. Can you describe for the Court your conversations with Hilary concerning publicity? If the notes will help you refresh your recollection, feel free to refer to them.

A. These were notes taken at the time, usually 10 minutes after the sessions. This particular note then was taken on August 20, 1986. Hilary came in talking about the fact that she had seen something on TV of which I was a part about her having been sexually abused. So we began to talk about it.

What I explained to her was that I had two different ideas about this. One that I wanted to protect her privacy, and second of all, that I wanted people to know that she and her mother were telling the truth about what had happened. She seemed to understand that, and I think got closer to me at the end of that session than she had been for a long time, which is I think she thought I understood how she felt about things.

Q. Have you had an opportunity to review the broadcast, Hilary in Hiding, that is at issue in this case?

A. Yes, I have.

Q. Do you have a professional judgment based on your treatment of Hilary with respect to whether the airing of this [53] broadcast would cause her any harm?

A. Yes, I do.

Q. And what is your opinion?

A. In my opinion, based on my knowledge of Hilary, I believe that it helps create an atmosphere of protection for her, and that to me is the main reason for any press coverage, is her protection. Based on my knowledge of her, I do not see a negative outcome for her based on this particular broadcast, which I think protects her privacy as well as it can by the shadowing of her face.

Q. Have you seen other broadcasts about Hilary here in the United States over the last six months?

A. Yes.

Q. Based on your observation, is this broadcast materially different in the impact that it would have on Hilary as any of those other broadcasts?

A. I believe it is one of the ones that might have a more positive impact for her safety.

Q. And why is that?

A. Because I think it presents Hilary's story by seeing Hilary.

MR. LEVINE: Your Honor, I have no further questions.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. LEWIN:

[54] Q. Dr. Froning, with regard to the episodes that are on the film, am I correct in saying that—first of all, were you there when that film was made?

A. The one with David Corwin and myself and Dr. Morgan and Hilary, yes, I was there.

Q. And if I recall correctly, you were in the room, but not during the period of time that makes up the bulk of what is on the film?

A. That's correct.

Q. And am I correct in saying that, in fact, Hilary did not want you or Dr. Corwin to be in the room when she was making these statements?

A. That's correct.

Q. And this is after you had been her therapist for how long?

A. Eleven month.

Q. And this was sometime after this meeting in August when you say you went on television; is that correct?

A. That's correct.

Q. And so she was only ready to disclose that when you were out of the room and Dr. Corwin was out of the room?

A. That seemed to be more comfortable to her, yes.

Q. And just in terms of your expert opinion, is it fair to say that the child under those circumstances is really disclosing something that is most private to her if she wants everybody else to leave other than her mother?

[55] A. I don't know if private is the word I would use. Maybe something she's ashamed of.

Q. She's ashamed of. So she doesn't want it known by anybody other than her mother in the confidentiality of that room?

A. I don't know that I can interpret that from that action of Hilary.

Q. Well, how else would you interpret her asking you and Dr. Corwin to leave?

A. Just because it is more comfortable for her to tell her mom. She's more used to telling her mom. She was thinking about the feelings she was having right then and not who would see this or anything like that.

Q. And you think a child would not feel betrayed if afterwards it turned out that what she told her mom confidentially after she asked you and Dr. Corwin to leave is broadcast to the entire world on television?

A. I don't—she knew it was being videotaped, and she knew that Dr. Corwin and I would see the tape. We made that clear to her.

Q. You told her that you were going to see the tape?

A. Yes.

Q. And nonetheless, she—
THE COURT: How old was she at this time?
THE WITNESS: Four years old.

BY MR. LEWIN:

[56] Q. Now, you've been experienced in other cases, haven't you, of sexual abuse?

A. Yes.

Q. And isn't it true that in the usual sexual abuse case with a minor, the minor is really very reluctant to talk about the episode?

A. Absolutely.

Q. And that it is ordinarily viewed as embarrassing by the child to have to speak about it and to have it made public?

A. To speak about it, sometimes to have it made public.

Q. Well, would you say sometimes more often than not?

A. Probably.

Q. And, in fact, isn't it true that in order to overcome that, you've got to really kind of persuade the child that it was good for it to become public in some way?

A. I wouldn't say that. I would talk to them about the issues that it brings up for them. I know of a particular child, if you'd like an example of how it was handled when it became public.

Q. But we had a conversation this afternoon in which you told me, did you not, that really in these other cases that you've had, the children have expressed concern and then you had to be talking to them and persuading them that it was really no shame for them to become public?

A. That's correct.

[57] Q. But that ordinarily children view it as being an embarrassment and a shame for them for that to be public.

A. That's because of the context that incest occurs, which is that it is secret and that it is done without any-

one else present. They have—children have a feeling of shame about it. You know, I don't believe that we, as a society, should add to that shame.

Q. Well, would you generally believe that conversations that you have with children who have reports of being sexually abused, would it be good for those children if those sessions with them were broadcast on television to the public?

A. Oh, absolutely not. I mean this—

Q. It would be harmful, wouldn't it?

A. —is a most extraordinary situation.

Q. But in the ordinary case it would be very harmful to a child to broadcast a session in which the child is describing an incestuous sexual episode with a parent; is that true? In the ordinary case?

A. Without permission of the child?

Q. Well, let's take a four year old child, with or without permission. First of all, is the permission of a four year old child, I mean, do you think that's really something that ought to bind whether a matter like that ought to go on television?

A. Well, I'm a clinician, not a lawyer.

[58] Q. I understand.

But as a clinician, do you think it is good in the long run for a child, for that child to be bound by what she says at the age of four years old as to whether she thinks she wants to be on television?

A. I can't answer that question. I don't know. That would be speculation.

Q. Well, you'd agree with me, that's not really sensible that a child ought to be bound by—

A. That's all we have. That's all we have. If we had something else, then—

Q. And you'd agree with me that ordinarily it would be very harmful to a child to broadcast over television this very private discussion that she has about a sexual episode that she relates happened to her?

A. If she wanted people to know about it, then I don't think it would be very harmful. If she didn't want people

to know about it, then I would think it might be harmful to her.

Q. Well, would you agree with me that if she wanted everybody to leave the room at the time, she apparently did not want everybody to know about it?

A. I don't think that you can draw that conclusion, because what she was saying is she is just more comfortable talking about it without us there. She knew—she had told those things to me many times, and she told Dr. Corwin many times [59] after that about her abuse. It's just that particular time she didn't feel comfortable doing it.

Q. It's a fact, is it not, Dr. Froning, that the reason for your conclusion is that you are firmly and totally persuaded and you fully believe that, in fact, Hilary Foretich was sexually abused?

A. Yes.

Q. If that were—if there was some doubt in your mind about whether she had been sexually abused, you would agree that it would be harmful for that kind of intimate discussion to be broadcast publicly; is that true?

A. I don't have any clinical experience to answer that question.

Q. Well, let me ask you about clinical experience.

You sometimes have patients or children who report to you that they have been sexually abused, but you may have some doubt about whether they have or have not been sexually abused?

A. That's true.

Q. Would you have any doubt at all in your mind that if you had such a meeting with a child, and there were some doubt about whether the child was sexually abused, that it would be harmful to that child to have such a meeting broadcast on television?

A. That's such a hypothetical. I'm really having a hard time answering that hypothetical because the issue is protection, [60] not privacy.

Q. No, no. I mean you have had cases of children about whom will tell you that they have been sexually abused, but you are not sure whether they have or have not. Has that happened?

A. If there were a privacy, privacy would come first, unless protection needed to come first.

THE COURT: But he's asking you a very simple question. If a child has come and has been mistaken or has told you a fantasy, he's asking you how would the child be better off if you put that on nationwide television, which would only prove that the child has fantasized. How would that child be better off?

THE WITNESS: I don't think he or she would be better off.

THE COURT: Is that the question you were asking?

MR. LEWIN: Well, yes.

BY MR. LEWIN:

Q. But even short of that, if you didn't know whether it was a fantasy or not. In other words, what I am saying to you, assume with me that you have a child who tells you this kind of an intimate story and you don't know whether it is true or not. You would agree, would you not, as a professional psychologist that it would be harmful to that child to have the confidential discussion with you in which she describes her sexual abuse broadcast on television?

[61] A. Yes, I agree.

Q. And, therefore, the only reason why you are stating your conclusion from the witness stand here today is because you believe personally from all your discussions that there was sexual abuse?

A. Correct, and Hilary needs protection from that.

Q. But to the extent that a Court concludes that at the present time it doesn't know whether there was sexual abuse, you agree, as a professional, that it would be harmful to a child in that circumstance where you don't

know whether there is sexual abuse to broadcast this kind of a film?

A. I'm not a lawyer or a judge. I'm a clinician making decisions on—

THE COURT: I think she's answered the question. Let's go on.

MR. LEWIN: All right.

BY MR. LEWIN:

Q. And finally, let me ask you, you've said in answer to questions from defendants' counsel that you don't think that this film is materially different from any other things that have appeared on television regarding this case. Has there been any other—

A. I don't believe that's what I said.

Q. Oh, I don't know. What did you mean when you said it wasn't materially different?

[62] A. The only thing that is different is the Corwin piece, because that has not been shown before.

Q. All right.

Well, that's what I'm asking you. Would you agree with me that that piece which has Hilary describing all this is materially different from anything that has ever appeared on television before, except for this film to the extent it has appeared on television?

A. I think it is different, yes.

Q. And it is different from your vantage point in terms of the impact on the child as a psychologist. See that that being on television has more—is likely to have more of a lasting impact on her than any other thing that has heretofore appeared on television?

A. I wouldn't make that conclusion.

Q. Well, do you think it makes a material difference to her psychological well being whether or not this particular portion appears on television?

A. I don't know whether she would have more problem with her crying on TV or her telling about the abuse on TV.

Q. Oh, good. I'm glad you raised that.

How about the crying on TV? Would that have some psychological impact, the crying? Forget about the abuse.

A. I don't know.

Q. You're a psychologist. Do you think it would in terms of [63] children of that age if their crying in these circumstances is broadcast and is, therefore, available to the public and can always be sort of played back to them or people can say they've seen it. Could that have a harmful impact on a child?

A. I suppose it's possible. You have to weigh the greater harm of lack of protection.

Q. And to you the ultimate thing is that this child has to be protected from Dr. Foretich?

A. She has to be protected from further sexual abuse, yes.

Q. And that justifies putting it on television? That's the thing to your mind justifies putting it on television?

A. Absolutely.

Q. And it is a fact, is it not, that in terms of your professional relationship with Hilary that has grown out of Dr. Morgan retaining the Chesapeake Institute?

A. That's correct.

Q. So that you have essentially been paid for your services through the Chesapeake Institute which was retained by Dr. Morgan?

A. At $16 a hour, yes.

MR. LEWIN: Thank you.

THE COURT: He's getting nothing. Usually lawyers, you can make them feel bad when you say something like that, but not this one.

Now, would you tell me in this Exhibit 2, there is a [64] little asterisk and it says, "I explained my difficulties." Is that you talking?

THE WITNESS: Yes.

THE COURT: And it says, "I wanted people to believe her and her mother." Is that what it says?

THE WITNESS: That's correct.

THE COURT: But I felt badly about sharing private things about her on TV.

THE WITNESS: That's right.

THE COURT: She seemed to understand. What did you mean by that?

THE WITNESS: I was sharing things that had gone on in our sessions, and she and I both knew that those were private.

THE COURT: Well, what did you mean by you felt badly about sharing private things on TV?

THE WITNESS: Oh, I had been interviewed on TV about Hilary's abuse.

THE COURT: And she saw that?

THE WITNESS: She saw one broadcast.

THE COURT: And she was unhappy about it?

THE WITNESS: She was initially unhappy, and then seemed to understand after we talked about it.

THE COURT: And you said, you felt badly about it?

THE WITNESS: I did. I had some concerns. I mean [65] psychologists are not used to sharing confidential information.

THE COURT: In this case here, how did you meet those concerns or satisfy those concerns when don't you usually try to get the permission of the patient?

THE WITNESS: Well, I got her mother's permission.

THE COURT: You got the mother's permission.

THE WITNESS: That's what is required in the ethics of a psychologist.

THE COURT: But weren't you aware there was a guardian ad litem here?

THE WITNESS: There was not yet one appointed at that point.

THE COURT: There had not been one appointed at this time?

THE WITNESS: Until September of 1987.

THE COURT: When was that, September?

THE WITNESS: Yes, and this was August.

THE COURT: So you felt—

MS. MITTLEMAN: Not 1987, Your Honor. Hilary was abducted in August of 1986.

THE WITNESS: Excuse me. September of '86.

THE COURT: Well, can I get the date when the guardian ad litem was appointed?

THE WITNESS: September '86. It was after Dr. Morgan got out of jail the first time.

[66] THE COURT: So in September of '86—

MS. MITTLEMAN: She was appointed to facilitate the visitation and most of these so-called therapy sessions were under court supervision, et cetera. So there was certainly access to getting other permission besides Dr. Morgan.

THE COURT: Are you saying that all these permissions that you granted and gave all took place before a guardian ad litem had been appointed?

THE WITNESS: No, my understanding of the role of the guardian ad litem was only to do with things that occurred in D.C. Superior Court. That was what was explained to me by the guardian.

THE COURT: Yes but don't you think that that would have been a person that you should have gone to since you knew there was this litigation between the mother and the doctor, Dr. Foretich. I guess they are both doctors. Between her mother and her father.

THE WITNESS: The only conversation—well, the only—I did talk with her about publicity?

THE COURT: And what did she say?

THE WITNESS: Well, I sent her an article where I was quoted, and she sent me back a note and said, thank you.

THE COURT: But she's here today opposing this. I assume she's still opposing this; is that correct?

MS. MITTLEMAN: Yes, Your Honor. She is just ill [67] today.

THE COURT: All right.

THE WITNESS: We have very different views of this case, Ms. Holman and I.

THE COURT: I know you do. I must assume you have.

All right. Anything further? Is there anything further? Any further witnesses?

Do you have any further witnesses?

MS. MITTLEMAN: I'd like to—

THE COURT: Go ahead. But let's do it quickly.

MS. MITTLEMAN: Very, very briefly. I would just like to comment that if she was proffered as some sort of an expert witness, we would object to that.

THE COURT: She hasn't been qualified as an expert. She's a fact witness.

MS. MITTLEMAN: Okay. Exactly. That's my point.

THE COURT: In this jurisdiction, usually a fact witness cannot be an expert witness.

MS. MITTLEMAN: Okay. That would be my point that she would be a fact witness, and so that her testimony as to what is good treatment or bad treatment is only a fact.

THE COURT: Is there anything further?

MS. MITTLEMAN: I would also like to mention that Mary Froning and Chesapeake Institute are defendants in another litigation pending in the United States District Court.

[68] THE COURT: For whom?

MS. MITTLEMAN: Who are the plaintiffs?

THE COURT: No, who has that case?

MS. MITTLEMAN: Judge Green.

THE COURT: Well, how many judges do you have in this case? How can we have all the judges? You have Green. You got Gesell. Why don't you the next time put in a related case and then give it to the first judge that had it. I mean I don't think we can tie up the whole bench here.

MS. MITTLEMAN: I agree, Your Honor. That was one reason why asking for a remedy of coming to Court after this thing was broadcast would just be one more

case. I mean, you know, the travesty that is done to Hilary—

THE COURT: I think that I would suggest to my brethren and sisters on the bench that somehow we get—which Green was it, Joyce or Harold?

MS. MITTLEMAN: Harold Green. That would be fine, Your Honor.

THE COURT: And who was the first judge that had one of these cases?

MS. MITTLEMAN: Judge Gesell.

THE COURT: Are you the one that is bringing all these cases?

MS. MITTLEMAN: Yes, Your Honor.

THE COURT: I would suggest that we get them before [69] one judge.

MS. MITTLEMAN: That would be acceptable.

THE COURT: See, you're running in now—I'm being accused of deciding differently than Judge Gesell, and that's what we're trying to avoid.

MS. MITTLEMAN: I understand that.

THE COURT: Now, but I don't know. I think we're going to have to handle it. Betty, will you talk to the other Clerks and see how they want to handle this.

Anything further you have? Oh, I'm sorry. Go ahead.

MR. LEWIN: Your Honor, I'd just like to—

THE COURT: I cut you off. Did you want to have any questions you want to ask?

MS. MITTLEMAN: Well, I mean, if she's a fact witness, she stated what she observed. So I'm not going—in other words, I'm not going to rely on her opinion.

THE COURT: I think Mr. Lewin did a pretty good job.

Go ahead.

MR. LEWIN: As far as I'm concerned, the witness can step down.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: All right.

MR. LEVINE: Your Honor, I just want to make two very quick points. I realize the hour is getting late. One is that [70] can we just have it agreed that for purposes of an appellate record everything that we've submitted with our papers, including the two tapes and the affidavits this morning are in evidence for purposes of—

THE COURT: Yes. But let me say this to you. I, again, the last I've seen of the law on TRO's, I don't know that they are appealable. There may be some exception. But this is a TRO that I'm issuing in this case, and I am setting a preliminary injunction for—well, 10 days takes us to recess. I will put it on the 17th. You're assuming you're going to appeal, and I assume that for one day that you will maintain the TRO. If you don't, I'll issue another one.

This will be the 17th, at 10:00 a.m. or 9:30.

MR. LEVINE: Your Honor, just for the interest of completeness of the record, I feel like I must make one point.

THE COURT: Surely. You've been very good, I must tell you. I admire you. Go ahead.

MR. LEVINE: If there is one thing that is clear in the law surrounding the First Amendment, and I'm quoting directly from cases, there is a "heavy presumption" against prior restraints. That means they have the burden to show that they've got a cause of action, that they've got evidence in support of the cause of action. There is no heavier presumption in our law, it seems to me than that against prior restraints.

[71] THE COURT: I understand that.

MR. LEVINE: And I'm faced with a situation here where they have known about this broadcast for over a month. They apply for a TRO the night before the broadcast is supposed to come on. They put on absolutely no evidence, not a centilla [sic] of evidence. We come forward with evidence, including the views of a clinician who has examined the child 80 times that this is not a problem.

They have no evidence to rebut it.

THE COURT: They have had the most graphic and the most dynamic evidence that you could conceive of, and that's the document itself, and I don't know what more—he now has the witness here I think that shows that she may not have been as careful as she should have been in this case. So I think they've got evidence.

And, indeed, this is a TRO. There is a legal issue here. You're looking at it strictly from the First Amendment. I believe you've got to look at it from the First Amendment, but you also got to look at it from the interest of this child.

And we in this country are very protective of children, and we've got a four year old girl that we're now told gave a consent. How conceivably could she have done that? Unless she might be a rocket scientist. I mean what they did to this—if there has been abuse, in my view, there has been a grave abuse of this child, of making her—why she needs 11 [72] months of being under a doctor's care when they are videotaping every one of these sessions and then giving it to the media. I can't understand that.

MR. LEVINE: Your Honor, with all due respect--

THE COURT: Really, I must tell you, and, again, I don't want to take any sides in this crazy kind of litigation, but I wish someone would look at this child's interest. That was my concern, and I can't conceive—as a father, as a parent, I cannot conceive that this could in any way be in the child's interest.

MR. LEVINE: And Your Honor, if they had put on a psychiatrist, if they had put on evidence, if they had done anything to meet their burden.

THE COURT: They'll be given that opportunity.

MR. LEVINE: But in the meantime, you are taking a broadcast that has already been broadcast nationally once, you say it's a temporary restraining order. It is still an injunction against publication, against broadcast at this time.

THE COURT: Go ahead. I've got to give you some time, because he's going to be going out of here.

MR. LEWIN: Just on that. Just on this last point, Your Honor, I trust that the reason I sort of acquiesced when I was told that there was a witness was that in case there was any question about evidence, I did want to get something in on this. I think, frankly, if this case is taken up on appeal, [73] the testimony of this witness is I think helpful at least in terms of my case.

THE COURT: You got the tape.

MR. LEWIN: The tape and I would urge that the transcript certainly be transcribed promptly, if, in fact, counsel is planning to take this up to the Court of Appeals. But I think the Court's conclusion that there ought to be a temporary restraining order issued can be based, I think, on the tesitmony of this witness.

THE COURT: Fine. Will you give me a document now? I have not seen that other piece, and since I have not seen it, and you tell me—you know how to reach it?

MR. LEWIN: It very shortly follows—

THE COURT: We don't have the film.

MR. LEVINE: It's here.

THE COURT: You have it?

MR. LEVINE: It went back downstairs.

Perhaps we could short circuit this a little bit. I talked to my clients before I came over here. They were debating between whether they would pull the broadcast totally or whether they would do something electronically to remove the segment. I'll represent to the Court that if they are going to remove one for this purpose, they'll remove both. So they'll either do neither or both.

THE COURT: Were you able to draft a piece of paper [74] while you were waiting there?

MS. MITTLEMAN: There was an order, Your Honor, attached.

THE COURT: Where's the order?

MR. LEVINE: Your Honor, I would vehemently object to the order. It's over broad. It refers to any visual depiction of Hilary.

THE COURT: I'm not going to give an over broad order.

Mr. Lewin, when do you think—I can give you a—I got in my outer room a word processor.

MR. LEWIN: We'll draft up an order, Your Honor.

THE COURT: I want to see it. So you can wait in the room. All right.

(Proceedings concluded at 5:25 p.m.).

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0796

SPORKIN, J. SS

ERIC A. FORETICH,
10440 New Ascot Drive
Great Falls, VA 22066
(703) 759-5530

and

HILARY FORETICH, an infant who sues through
her father and next friend,
Diplomat Motel
127 Papanui Road
Christchurch 1, New Zealand,
Plaintiffs,

v.

LIFETIME CABLE
36 - 12 35th Av.
Astoria, NY 11106
(718) 482-4000

and

BRITISH BROADCASTING CORPORATION
2030 M St., N.W.
Suite 607
Washington, D.C. 20036
(202) 223-2050,
Defendants.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

[April 5, 1990]

1. Jurisdiction is founded upon 28 U.S.C. § 1331 and § 1332, and D.C. Code § 13-423(a). Venue lies in this district under 28 U.S.C. § 1391, because the claims alleged arose in this district.

2. Plaintiff Eric A. Foretich, D.D.S., is an oral surgeon and the father of Hilary Foretich. He is a citizen of the commonwealth of Virginia.

3. Plaintiff Hilary Foretich is the infant child of Eric Foretich and Elizabeth Morgan. Hilary was born on August 21, 1982. She was a citizen of the District of Columbia, residing at 4401 Westover Place, N.W., Washington, D.C. 20016, before she was taken away from the District of Columbia in violation of a court order in *Morgan v. Foretich*, C.A. No. D-684-83, a case still pending in the D.C. Superior Court before Judge Dixon. Hilary was recently located in New Zealand, living with her maternal grandparents. Matters are pending at this time in the New Zealand courts which will have a bearing on Hilary's residence.

4. Defendant Lifetime Cable is, upon information and belief, a company which airs television programs over cable. Upon information and belief, its principal place of business is in New York.

5. Defendant British Broadcasting Corporation is, upon information and belief, a foreign corporation. It maintains an office in the District of Columbia.

FACTUAL BACKGROUND

6. The British Broadcasting Corporation ("BBC") has produced a program titled *Hilary in Hiding* ("program"). It was aired in Britain for their *40 Minutes* program.

7. Upon information and belief, Lifetime Cable will air this program on the following dates: April 6 at 9 p.m., April 7 at 10 p.m., April 14 at 3 p.m., and April 19 at 2 p.m. The program is listed on pages 49 and 51 of the *TV Week* section of *The Washington Post*, dated April 1-7, 1990.

8. The Organization, Friends of Elizabeth Morgan ("FEM") sends out a newsletter to an unknown number of those on the mailing list. The newsletter dated Spring 1990 gives notice of the upcoming program under the heading "Media Watch."

9. FEM has an 800 toll-free number that informs the caller about matters involving Dr. Morgan. The number is 1-800-888-MRGN. Upon information and belief, the message on the 800 number has recommended the upcoming program, *Hilary in Hiding*.

10. The program contains two different tapes showing Hilary. These tapes involve either conversations and demonstrations with dolls about sexual matters, including discussion of the genitals, or show Hilary in a private situation, including discussion with her mother and a social worker about a visit with her father. Upon information and belief, the tape with Dr. Morgan and the social worker was filmed at Dr. Morgan's former home in the District of Columbia.

11. Upon information and belief, the tapes of Hilary included in the program were prepared under the auspices of her mother for use in litigation. As such, they have no literary, scientific, educational or any other value to the public.

12. The tapes explicitly depict Hilary in private situations, discussing intimate and purportedly sexual matters. They include some captioning in the apparent effort to clarify Hilary's statements to the viewing public.

13. The allegations of sexual abuse which are discussed in the program have not been substantiated in

court. *See Morgan v. Foretich*, 546 A.2d 407, 410 (D.C. App. 1988).

14. Dr. Foretich is portrayed in a false light in this program, particularly through the showing of the tapes of Hilary, which were prepared under the auspices of Dr. Morgan.

15. Plaintiffs will be specially and irreparably harmed by the airing of the program, particularly the segments showing Hilary on camera. Plaintiffs have no adequate remedy at law.

16. I, Linda P. Holman, the D.C. Superior Court-appointed guardian *ad litem* for Hilary A. Foretich, hereby join in the request to have those portions of the broadcast which feature Hilary enjoined from airing. One of the videotapes of Hilary was made during a therapeutic session with David Corwin and Mary Froning during litigation and the other was made before a court-ordered visit with the court-appointed social worker. As Hilary's guardian *ad litem*, I object to the tapes' airing. I have not granted permission to have the tapes made public nor would I ever do so. The therapeutic tape is being broadcast in violation of Hilary's doctor-patient privilege, as I have not waived her right to confidentiality. More importantly, however, both of the videotapes violate Hilary's guaranteed rights to privacy. The tapes are explicit and I believe their airing will irreparably harm Hilary, both now and in the future as she matures. Because the tapes are highly personal, private and intimate, in Hilary's best interest, they must remain so and therefore be deleted from the program. Defendants cannot demonstrate that they are prejudiced by the deletion of these portions of the program. Although I strongly object herein only to those portions of the program with Hilary on air, I believe the airing of the whole program does a disservice to Hilary and also invades her right to privacy.

WHEREFORE, plaintiffs pray as follows:

A. For an Order declaring that the program *Hilary in Hiding* will not include any portions or segments with Hilary appearing on camera;

B. For a preliminary and permanent injunction, restraining defendants from any airing, licensing or distribution of the program, *Hilary in Hiding*, containing segments showing Hilary on camera;

C. For an Order awarding plaintiffs their costs, expenses and attorney's fees; and

D. For such other and further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Elaine Mittleman
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Guardian *ad litem*
for Hilary Foretich

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-796 SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

ORDER

It is this 6th day of April 1990,

ORDERED that Nathan Lewin, Esquire, is appointed Guardian ad Litem for the minor plaintiff Hilary Foretich.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

Copies to:

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Supreme Court, U.S.
FILED
AUG 6 1990
CLERK

No. 90-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HILARY FORETICH,
Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

LEE LEVINE
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QUESTION PRESENTED FOR REVIEW

Whether a trial court's temporary restraining order, barring the telecast of portions of a news documentary of conceded public interest, was properly vacated by an appellate court because the moving party made no showing to justify the injunctive remedy it sought.*

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* Pursuant to Supreme Court Rule 29.1, Respondent British Broadcasting Corp. states that it has no parent company and holds shares of the following companies: Listener Publications, Ltd.; House of Commons Broadcasting Unit, Ltd.; Broadcasters Audience Research Board, Ltd.; Secuir S.A. (Belgium); Visnews, Ltd.; and Multi Media Corporation, Ltd. Respondent Lifetime Cable is not a legal entity. The Lifetime Television network is owned and operated by Hearst/ABC-Viacom Entertainment Services, a joint venture, acting as a partnership.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-35

HILARY FORETICH,

Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, respondents respectfully supplement petitioner's *Statement of the Case* as follows:

1. The television documentary at issue (the "Documentary"), as petitioner correctly notes, examines the

"internationally publicized" dispute between Drs. Elizabeth Morgan and Eric Foretich concerning their daughter Hilary, "a subject of substantial public interest." Petition for a Writ of Certiorari ("Petition"), at 1-2, 6. That dispute raises significant public policy issues regarding the ability of the American legal system to deal effectively with charges of child sexual abuse. Dr. Morgan's highly publicized views with respect to those very issues led her to violate court orders and place her daughter in hiding rather than permit Hilary to attend unsupervised visits with her father. Indeed, the extraordinary public interest regarding this matter is illustrated by, among other things, the special legislation enacted by Congress to release Dr. Morgan from her incarceration for failure to obey the court's orders. *See* Pub. L. No. 101-97 (1989).

2. At the center of this controversy are allegations that Dr. Foretich sexually abused Hilary and, specifically, the issue of whether those charges are accurate or are the result of Hilary's being "coached" by Dr. Morgan. *See* Appendix to Brief in Opposition ("R. App.") 6a ¶ 9 (Declaration of Stephen Lambert, admitted in evidence in trial court). Equally central to the controversy are various rulings of the District of Columbia Superior Court including, *inter alia*, its decision to permit unsupervised visits between Hilary and her father when that Court had concluded that the evidence with regard to whether he abused her was "in equipoise," *Morgan v. Foretich*, 546 A.2d 407, 410 (D.C. 1988), its order incarcerating Dr. Morgan for placing Hilary in hiding, and its refusal to entertain videotaped evidence of Hilary describing her father's abuse, *see Morgan v. Foretich*, 528 A.2d 425, 428 & n.6 (D.C. 1987). The Documentary focuses upon the Superior Court's adjudication of these issues, which are part and parcel of the larger debate concerning the legal system's competency in dealing with conflicting claims of child abuse. *See Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) ("Courts and legisla-

tures alike have struggled with this deeply troubling problem.").[1]

3. The undisputed evidence reveals that the videotaped conversation between Hilary and her mother, which petitioner seeks to enjoin, was neither "surreptitiously" nor "covertly" filmed, as petitioner repeatedly contends. *See, e.g.*, Petition, at (i), 2, 3. Dr. Mary Froning, the child's treating psychologist, testified quite clearly and without contradiction in the trial court that Hilary knew she was being videotaped and that she knew that others, specifically Drs. Froning and Corwin, "would see the tape. We made that clear to her." Appendix to Petition for a Writ of Certiorari ("App.") 44a. Accordingly, petitioner's self-described "sole" rationale for seeking review in this Court—*i.e.*, "preventing the broadcast on television of the *surreptitiously* taped private conversation [Hilary] had with her mother," Petition, at 2 (emphasis added)—simply has no basis in fact.

4. Petitioner correctly notes that Dr. Froning did not consult with Linda Holman, Esq., appointed by the District of Columbia Superior Court as a guardian *ad litem* for Hilary, before consenting to Dr. Morgan's providing the videotapes to respondents. Petition, at 6. Dr. Froning's undisputed testimony, corroborated by Dr. Foretich's counsel in open court, however, is that Ms. Holman's appointment is limited to supervising and reporting to the Superior Court about Dr. Foretich's court-ordered

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[1] In one lawsuit instituted by Dr. Morgan and Hilary against Dr. Foretich, the Fourth Circuit, including Justice Powell sitting by designation, held that a child's own statements often are the best evidence of sexual abuse. *See Morgan v. Foretich*, 846 F.2d at 943-50. Indeed, the court noted, "[o]ften, the child is the only witness." *Id.* at 943. Thus, the videotape at issue speaks not only to the truth of the sexual abuse claims against Dr. Foretich, but also to Dr. Foretich's allegation that Hilary was coached by her mother to make the claims.

visits with Hilary. *See* App. 52a (Dr. Froning); App. 8a (Dr. Foretich's counsel).[2]

5. The tape recording at issue was provided to respondents by Dr. Morgan, with the consent of Dr. Froning, Hilary's treating psychologist. App. 40a.[3] The original recording presumably remains in Dr. Morgan's possession. Since respondents are the only defendants named in this lawsuit, no other party would be bound by the injunctive relief petitioner seeks. Moreover, virtually identical recitations of Hilary's own descriptions of her father's alleged abuse, as well as portions of the challenged videotape itself, had been disseminated widely by the media months before petitioner and Dr. Foretich instituted these proceedings.[4]

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[2] Ms. Holman, who did not appear or testify in the trial court and who is a lawyer, not a clinician, has not seen Hilary Foretich since 1987. The statements attributed to her in Dr. Foretich's complaint—*i.e.*, that the "tape is being broadcast in violation of Hilary's doctor-patient privilege," App. 62a—are particularly inapposite since the videotape depicts Hilary talking with her mother, *not* her doctor, and her mother, Hilary's custodial parent and the other party to the conversation, provided the tape to respondents.

[3] Petitioner incorrectly states that the tape was provided to respondents by Dr. Froning. *See* Petition, at 5; *see also* R. App. 5a-6a ¶¶ 4, 6 (Declaration of Stephen Lambert).

[4] *See, e.g.*, Fremon, *The Real Elizabeth Morgan Story: What the Jury Was Never Told, What the Judge Refused to Hear*, MOXIE, Feb. 1990, at 22 (" 'I see my daddy's hiney,' said Hilary, 'and I go like this . . .' and she made licking motions with her mouth and tongue."); *id.* at 117 ("Hilary said, 'Daddy spanked me with his fucker' and pointed to her own vaginal area and doll's to show where."); *id.* ("Hilary made clearer what her daddy did. She had the doll representing Hilary lying in bed both face down and face up with the daddy doll on top of her. She said he 'poked his fucker in my hiney.' When asked where, she put her finger in the anus of the Hilary doll and then said he put it in 'the other hole, too' and put her finger in the vagina of the doll. Then she showed with the daddy doll how the penis entered the anus and the vagina."); Trebilcock, *Hiding Hilary*, GLAMOUR, Nov. 1989, at 300 (" 'I see my daddy's heinie and go lick lick' "); *id.* (Hilary puts "daddy doll's

6. There is absolutely no evidence in this record supporting petitioner's claim that "respondents' commercial arrangements with television stations apparently controlled the timing of the broadcast." Petition, at 6. In fact, the scheduled telecasts, all of which have now been completed, followed shortly after the public revelation that Hilary Foretich is now living in New Zealand, the commencement of legal proceedings there, and the relocation of Dr. Morgan, after the return of her passport by the Superior Court, to New Zealand.[5]

7. Dr. Froning did not testify, on cross-examination or otherwise, that "it is ordinarily harmful to a child to broadcast publicly the child's account of sexual abuse." Petition, at 7. To the contrary, Dr. Froning, a licensed psychologist with a doctorate in clinical psychology, *see* App. 37a, testified that, when a child has been abused, it is important that the child understand that there is "really no shame for them to become public." App. 45a.[6]

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penis to her mouth" and says " 'Daddy's heinie' "). In contrast to the foregoing, the Documentary contains far less extensive and less graphic references to Hilary's accounts of her abuse. *See* Petition, at 4 n.3. *See also* R. App. 7a ¶ 4 (Declaration of Lee Levine, admitted in evidence in trial court, referencing January 1990 CBS television broadcast including other portions of videotape at issue).

[5] In any event, petitioner's suggestion, that an asserted lack of "urgency" supporting telecast "on the particular dates in April" chosen by respondents justifies "temporary" injunctive relief, is demonstrably in error. Petition, at 6. This Court has long recognized that the burden imposed on those seeking to enjoin expression is in no sense "reduced by the temporary nature of a restraint." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[6] *See* App. 45a-46a (testimony of Dr. Froning) ("That's because of the context that incest occurs, which is that it is secret and that it is done without anyone else present. They have—children have a feeling of shame about it. . . . I don't believe that we, as a society, should add to that shame.").

Moreover, Dr. Froning expressly disputed petitioner's suggestion that this is, by any stretch of the imagination, an "ordinary" case. App. 56a. Indeed, based on her 87 therapy sessions with Hilary, *see* App. 38a, Dr. Froning testified that "victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them. I believe that the airing of 'Hilary in Hiding' would provide such reassurance to Hilary," R. App. 2a ¶ 10.

8. Neither petitioner nor Dr. Foretich offered any evidence—not a single witness, declaration or exhibit—in support of their application for injunctive relief. The Court of Appeals based its ruling vacating the temporary restraining order on the papers submitted by the parties, including the undisputed declarations submitted by respondents and admitted into evidence, the complaint and application for a temporary restraining order, and the Documentary itself. It heard no oral argument from counsel.

REASONS FOR DENYING THE WRIT

Petitioner's submission is premised on two assertions: "Not every order affecting future expression is presumptively unconstitutional" and "[j]udicial preservation of an individual's right to privacy may justify a court order barring a television broadcast." Petition, at 9, 10. As general principles of law, respondents have no present occasion to debate either of these observations. Neither proposition, however, supports petitioner's request for review in this Court because (1) they are in no manner inconsistent with the Court of Appeals decision at issue and (2) their application in this case does not render legally permissible the trial court's order (the "Order") vacated by the Court of Appeals.

I. PETITIONER DID NOT CARRY ITS BURDEN OF JUSTIFYING INJUNCTIVE RELIEF.

Petitioner's first proposition—that "not every order affecting future expression is presumptively unconstitutional"—may be accepted for present purposes. Presumably, expression that is not protected by the First Amendment enjoys no immunity from previous restraint beyond that imposed by generally applicable doctrines of equitable relief. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 707-08 (1930) (suggesting that injunction prohibiting obscenity is not presumptively unconstitutional); *Freedman v. Maryland*, 380 U.S. 51, 54 (1965) (same). Neither respondents nor the Court of Appeals has purported to suggest otherwise.[7]

The Court of Appeals concluded, quite unremarkably, that this petitioner had not made the requisite showing to justify the injunctive remedy it sought.[8] First, peti-

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[7] The Court of Appeals' one-paragraph order simply notes that the trial court's Order—concededly an injunction prohibiting future expression—is presumptively invalid and that petitioner's claims must "be redressed in legal actions that do not require a prior restraint in derogation of the First Amendment." App. 1a. Fairly read, especially given the expedited circumstances under which it was rendered, the Court of Appeals' unpublished order does not purport to declare a broad rule that injunctive relief is never permissible to redress privacy rights, but rather that *this* petitioner had not met its burden in *this* case of demonstrating either that it had stated a valid cause of action or that the expression at issue is unprotected by the First Amendment. *See* pp. 8-11 *infra*; *California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (citations omitted).

[8] The First Amendment notwithstanding, all applicants for temporary injunctive relief in the District of Columbia Circuit, including petitioner, are required to carry the considerable burden of demonstrating "that they have a substantial likelihood of success on the merits, that without such relief they will suffer irreparable harm, that the issuance of the injunction will not substantially harm other interested parties, and that the granting of such relief is in the public interest, or at least is not contrary to that interest." *Federal Food Serv., Inc. v. Marshall*, 481 F. Supp. 816, 818 (D.D.C. 1979) (citing *Washington Metropolitan Area Transit Comm'n v.*

tioner did not make any showing that the expression at issue is unprotected by the First Amendment, and the trial court purported to make no such determination. Not only did the trial judge decline to view more than three minutes of the forty-minute program, *see* App. 12a, he expressly stated that "the concern I have is really not with the first amendment. The concern I have is with this young child," App. 28a. The Order contains no findings that the expression at issue, which concededly addresses "a subject of substantial public interest," Petition, at 6; *see Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611 (1989), is unprotected by the First Amendment and recites no facts that would support such a conclusion in any event, *see* App. 3a-4a.

Second, although petitioner contended in the trial court that its claim sounded in the tort of invasion of privacy, *see* App. 22a, the lawyer who instituted the proceedings in Hilary Foretich's name disagreed, *see* App. 33a, and the trial judge expressly disclaimed reliance on the privacy tort in enjoining the telecast, *see* App. 31a. Indeed, the trial judge acknowledged that, although he "believe[d] there is a cause of action," he did not know "how the parties are going to be able to articulate it," App. 31a. Thus, the trial court's restraining order was premised on no identifiable legal right asserted by petitioner, whether flowing from the Constitution, *see Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (prior restraint request based on Sixth Amendment), statute, *see Near v. Minnesota*, 283 U.S. 697 (1930) (prior restraint sought pursuant to statutory nuisance regulation), the law of contract, *see Commonwealth v. Wiseman*, 356 Mass. 251, 259, 249 N.E.2d 610, 615 (1969), *cert. denied*, 398 U.S. 960 (1970) (prior re-

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Holiday Tours, Inc., 559 F.2d 841, 842 (D.C. Cir. 1977)). As the following discussion demonstrates, petitioner made no such showing.

straint permissible where defendant violates agreement), or common law tort.[9]

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[9] The trial court's reluctance to premise injunctive relief on the invasion of privacy tort is understandable since petitioner, even if it had endeavored to do so, could not demonstrate "a substantial likelihood for success on the merits" of that claim. *Federal Food Serv., Inc. v. Marshall*, 481 F. Supp. at 818. Although this is not the forum to debate in detail the merits of petitioner's invasion of privacy claim, suffice it to say that it faces a number of imposing hurdles, none of which petitioner even attempted to clear in the trial court: (1) Virginia, where Dr. Foretich resides, does not even recognize the tort, *see Foretich v. Glamour*, No. 89-3099, slip op. at 6 (D.D.C. Apr. 3, 1990) (Gesell, J.) (dismissing another invasion of privacy claim sought to be instituted by Dr. Foretich on his and Hilary's behalf); (2) the District of Columbia, where Hilary last resided in the United States, precludes invasion of privacy claims unless "the public has no legitimate concern" in the subject matter of the allegedly invasive publication, *Wolf v. Regardie*, 553 A.2d 1213, 1220 (D.C. 1989); *see* Petition, at 1-2, 6 (petitioner concedes existence of public controversy surrounding legal dispute concerning Hilary Foretich); (3) since the tapes at issue were provided to respondents by Dr. Morgan, Hilary's custodial parent, with the consent of her treating psychologist, such "[c]lear evidence of consent will insulate a party from liability" for invasion of privacy, *Vassiliades v. Garfinkel's*, 492 A.2d 580, 590 (D.C. 1985); and (4) since there is no privacy right under District of Columbia law attaching to "matters already publicly released" in the news media, *Wolf v. Regardie*, 553 A.2d at 1219, the literally thousands of articles and broadcasts in this country and abroad discussing the allegations of sexual abuse against Hilary, displaying her image by photograph and film, and repeating Hilary's own statements regarding the nature of the alleged sexual abuse, would appear to preclude petitioner's cause of action as a matter of law. *See* RESTATEMENT (SECOND) OF TORTS § 652D, comment b (1977) ("[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public").

In this regard, petitioner quite clearly misconstrues this Court's decisions in *Florida Star v. B.J.F.*, 109 S. Ct. 2603, and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In those decisions, this Court did not restrict its holdings to cases in which the information at issue had been supplied by a "government agency," as petitioner suggests, *see* Petition, at 13; rather, it held that "once the truthful information was 'publicly revealed' or 'in the public domain' [a] court could not constitutionally restrain its dissemina-

Third, the sole basis for the trial court's Order—that petitioner would suffer "irreparable harm" if the Documentary were not enjoined—is directly at odds with the *only* evidence before the court. Dr. Mary Froning, a licensed psychologist who had treated Hilary Foretich on more than 80 occasions, testified both in court and by declaration that, rather than causing her any harm, the telecast would "help[] create an atmosphere of protection for her." App. 43a. Petitioner offered no evidence, documentary or testimonial, to the contrary. Indeed, petitioner offered no evidence at all. Petitioner's court-appointed counsel acknowledged that, prior to seeking injunctive relief, he had not had the opportunity to consult, *inter alia*, with his client, the child's mother, the child's court-appointed guardian in New Zealand (where she currently resides), or with a single expert in such matters (with the exception of Dr. Froning, who pointedly disagreed with his conclusions). *See* App. 25a. Neither parent, no relatives, no experts other than Dr. Froning—in fact, no other witnesses—testified in court or provided testimony by declaration or affidavit in support of petitioner's prayer for injunctive relief. *See* App. 55a-56a.

Petitioner observes that a State's "interest in the 'protection of minor victims of alleged sex crimes from further trauma and embarrassment,' " can be a " 'compelling' one." Petition, at 12 (quoting *Maryland v. Craig*, 58 U.S.L.W. 5044, 5048 (U.S. June 27, 1990)). Even putting aside any State's failure to authorize, by legislative enactment, vindication of that interest through injunctions prohibiting publication or broadcast, petitioner never attempted to make the requisite "showing of necessity" in this case to demonstrate the propriety of the

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tion." 109 S. Ct. at 2610 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 103). In *Smith*, moreover, the Court expressly declined, even in the context of subsequent punishment, to limit its holding to cases in which "government itself provided or made possible press access to the information." 443 U.S. at 103.

relief it sought. *Id.* at 5049; *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (in context of court closure for minor's testimony, "it is clear that the circumstances of the particular case may affect the significance of the interest," so court must weigh "victim's age, psychological maturity and understanding, . . . the desires of the victim, and the interests of parents and relatives").[10]

Not one of the several commentators referenced by petitioner has questioned this Court's consistent placement of the burden of proof upon any litigant that seeks judicial intervention in the field of free expression, whether through prior restraint or subsequent punishment.[11] To the contrary, the commentators—and, more

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[10] At a minimum, any serious effort to suggest that Hilary Foretich would be harmed by telecasts of the Documentary in the United States must come to grips with the undisputed facts that (a) she now resides in New Zealand; (b) her name, her picture, and her own accounts of her abuse have been widely disseminated by both the print and electronic media; (c) she has been the subject of an ongoing dispute between her parents that has led to her mother spending 25 months in prison and to the surreptitious transfer of Hilary from the United States to New Zealand where she lived in hiding for two years; and (d) she and her mother, at the very least, believe she has been repeatedly subject to sexual abuse by her father. In that regard, petitioner's citation to *Morgan v. Foretich*, 528 A.2d 425 (D.C. 1987), is particularly inapposite. Not only does that case address a decidedly different issue—*i.e.*, Dr. Morgan's right to a public hearing—it was rendered in 1987, before Hilary's name and the allegations that she had been abused had become the subject of worldwide attention, before Dr. Morgan's lengthy incarceration, and before Hilary was taken to New Zealand. Even that decision, however, unlike the Order in the instant case, was rendered after the court heard extensive evidence and made specific findings about the circumstances that obtained at that time. *See id.* at 426.

[11] *See, e.g.*, Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 93 (1981) ("[t]he concept of prior restraint is coherent at the core"); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983) ("conventional" prior restraint doctrine unnecessary because "superseded by the expanded

importantly, this Court—have uniformly recognized that "temporary" restraining orders, such as the trial court's order in this case, "present a threat to first amendment rights not found in subsequent punishment schemes—the threat that expression will be abridged, if only for a short time, prior to a full and fair hearing before an independent judicial forum to determine the scope of the speaker's constitutional right." Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55 (1984). *Accord Freedman v. Maryland*, 380 U.S. at 58 ("the burden of proving that the film is unprotected expression must rest on the censor"); *Nebraska Press Association v. Stuart*, 427 U.S. at 559 ("A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted.").

The essential wisdom of this Court's decisions is well illustrated by the instant case. Although there is a substantial body of professional opinion, referenced by Dr. Froning in her testimony, that "victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them," R. App. 2a ¶ 10, the trial court, based solely on its review of less than three minutes of a forty-minute telecast, without the support of any testimony from

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substantive coverage of the First Amendment"); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 249 (1982) (same). The lion's share of scholarship has, moreover, embraced this Court's prior restraint jurisprudence and the historical tradition upon which it is premised. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 61 (1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-34, at 1039-42 (2d ed. 1988); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 671 (1955); Abrams, *In Defense of Tornillo*, 86 YALE L.J. 361, 367 (1976); Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 MICH. J. OF L. REFORM 497 (1982).

either expert or lay witnesses familiar with the underlying facts, and while acknowledging that it could not and would not attempt to untangle the merits of the underlying dispute between Hilary's parents, concluded that the telecast was "bad stuff" and should be enjoined. App. 13a. It is plain that the trial court's Order was premised on its and its appointed representative's "gut reaction" that the portion of the Documentary they viewed was "offensive," [12] a reaction that the First Amendment precludes them from according the force of law.

Simply put, petitioner made no showing in the trial court that the expression at issue in this case is unprotected by the First Amendment. Under such circumstances, it has been universally recognized that the "special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973).

II. PETITIONER RAISES A HYPOTHETICAL ISSUE THAT IS NOT RIPE FOR REVIEW IN THIS COURT.

Petitioner's failure to make any showing in support of its request for a temporary restraining order renders its second proposition—that "judicial preservation of an individual's right to privacy may justify a court order barring a television broadcast"—decidedly hypothetical and, at the very least, premature. As petitioner notes, it has now filed an amended complaint in the trial court alleging invasion of privacy and seeking both damages and injunctive relief. Petition, at 13 n.7. Unlike the defendants

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[12] *See, e.g.*, App. 34a (court complained that very act of obscuring the child's face, at the request of her treating psychologist, App. 40a, was "absolutely brutal" and "*particularly* bothersome") (emphasis added).

in *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986), respondents have not moved to strike petitioner's prayer for injunctive relief. Accordingly, if petitioner succeeds in carrying its burdens of (1) securing the trial court's consent to pursue this litigation in the name of Hilary Foretich,[13] and (2) prevailing upon its substantive claim that the Documentary constitutes an actionable invasion of privacy, there is nothing in the Court of Appeals order that precludes petitioner from asking the lower courts to determine whether judicial preservation of *this* individual's right to privacy justifies a court order barring further telecasts of *this* expression. At present, however, even if petitioner were correct and this case were "not moot, it surely is not ripe" for review in this Court. *Bowen v. Roy*, 476 U.S. 693, 722 (1986) (Stevens, J., concurring); *accord Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.' ") (citation omitted).[14]

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[13] In another action alleging invasion of privacy that Dr. Foretich sought to prosecute in Hilary's name, Judge Gerhard Gesell declined to appoint a guardian to assert such claims. *See Foretich v. Glamour*, No. 89-3099 (D.D.C. Apr. 3, 1990).

[14] The same concerns underly the cases cited by petitioner in connection with its suggestion that this matter is not moot. *See, e.g., Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990) (Article III courts confined "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon some hypothetical state of facts' ") (citation omitted); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) ("The Court has never held that a mere physical or theoretical possibility was sufficient. . . ."). Where, as here, the scheduled broadcasts by respondents have all been completed and "contingent future events," including petitioner prevailing on the merits in the trial court, "may not occur at all," *Lewis v. Continental Bank Corp.*, 110 S. Ct. at 1255, there can be no " 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur

The only two cases relied upon by petitioner illustrate the point. In *Huskey*, the trial court, in denying defendant's motion to strike plaintiff's prayer for injunctive relief, emphasized that its "denial of that motion should not be misunderstood as a decision confirming the actual availability of injunctive relief here. This opinion holds only that injunctive relief is not necessarily *im*proper. Only a future evidentiary showing will demonstrate whether or not such relief is appropriate in fact." 632 F. Supp. at 1296 (emphasis in original).[15] And, in *Commonwealth v. Wiseman*, 249 N.E.2d at 612, the Massachusetts court emphasized that injunctive relief was ordered following "2,556 pages of proceedings on eighteen trial days and sixty-four exhibits."[16] Thus, not only does

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involving the same complaining party," *Murphy v. Hunt*, 455 U.S. at 482.

[15] Judge Shadur's opinion in *Huskey*, moreover, expressly acknowledges the need to "tread gingerly in the area of prior restraints," whether "private" or "public" wrongs are alleged. 632 F. Supp. at 1294. In that regard, in *Nebraska Press Association v. Stuart*, this Court reaffirmed that "the barriers to prior restraint remain high," 427 U.S. at 561, even when injunctive relief is sought to vindicate "the most fundamental of all freedoms," an individual's right to a fair trial, *Estes v. Texas*, 381 U.S. 532, 540 (1965); *accord Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) ("[d]esignating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support" a prior restraint); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (reversing order enjoining news media from publishing name or picture of eleven-year-old boy because it "abridges the freedom of the press").

[16] In addition, the decision in *Wiseman* is premised not on a distinction between "public" and "private" rights, as petitioner contends, *see* Petition, at 11, but on defendant's failure to secure releases from the patients he photographed, despite his agreement to do so as a condition of gaining special access to the hospital from State officials. *See* 249 N.E.2d at 615. Of course, this Court's denial of *certiorari* in *Wiseman*, which preceded the decisions in *Nebraska Press Ass'n*, *Keefe*, and *Oklahoma Publishing*, is in no sense an adjudication of the merits of that case, petitioner's suggestion to the contrary notwithstanding, *see* Petition, at 11. *See Maryland v.*

petitioner fail to identify any judicial decision that conflicts with the Court of Appeals' order here, those decisions it does cite are demonstrably consistent with the Court of Appeals' conclusion.

In the last analysis, petitioner asks this Court to speculate about a host of matters that petitioner has not even begun to satisfy its burden of proving. Based on such speculation, it urges this Court to give its imprimatur to "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. at 559. The Court of Appeals properly vacated the trial judge's Order precisely because petitioner had not met its burden. Resort to this Court is plainly unwarranted unless and until petitioner prevails on the merits in the ongoing proceedings in the trial court and then presses its claim for injunctive relief.

CONCLUSION

For the foregoing reasons, respondents the British Broadcasting Corp. and Lifetime Cable respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (Frankfurter, J.).

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF DR. MARY L. FRONING

Pursuant to 28 U.S.C. § 1746, Dr. Mary Froning does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I received my doctorate in psychology from the Illinois School of Professional Psychology.

3. I am currently a co-director of White Oak Psychological Center. My specialty is child psychology and sexual abuse.

4. From August of 1984 to January of 1989, I also was employed as the senior staff psychologist at the Chesapeake Institute in Wheaton, Maryland.

5. During the course of my employment at Chesapeake, I was assigned the case of Hilary Foretich who I began seeing in January of 1986. I saw Hilary continuously on a weekly, and sometimes, by-weekly basis until August 18, 1987. There were 87 separate sessions.

6. In the fall of 1989, I was in contact with Stephen Lambert of the British Broadcasting Corporation concerning the documentary which they were preparing about Hilary Foretich. Mr. Lambert was aware of the existence of videotapes of Hilary Foretich in my possession and asked my permission to use the tapes as part of the documentary which was being prepared.

7. I provided those tapes to Elizabeth Morgan, who transmitted the tapes to Mr. Lambert, with my permission. However, these tapes were provided to Mr. Lambert on the express condition that Hilary's face would be obscured from view.

8. I have reviewed the program "Hilary in Hiding" which I understand is at issue in this litigation.

9. In my professional judgment, the showing of this program would help to create an environment of protection for Hilary and would not otherwise be harmful to her well-being.

10. It is my professional opinion that victims of child sexual abuse need to be reassured that they have experienced nothing shameful because of what has happened to them. I believe that the airing of "Hilary in Hiding" would provide such reassurance to Hilary.

Executed on this 6th day of April, 1990, in the District of Columbia.

/s/ Mary L. Froning, Psy. Dr.
DR. MARY L. FRONING

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF PATRICK GUY

Pursuant to 28 U.S.C. § 1746, Patrick W. Guy does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I am a member of the Bar of the State of New York.

3. I am Vice President of Legal and Business Affairs for Hearst/ABC-Viaccm Entertainment Services ("HAVES"), a joint venture that is licensed by the British Broadcasting Corporation (the "BBC") to telecast the documentary "Hilary in Hiding," which is the subject of this litigation. A tape of the documentary is submitted to the Court herewith as Exhibit A to this Declaration. HAVES also operates the Lifetime Television network (the "network"). The network is a 24-hour program service offering news, entertainment and information programming to approximately 47 million households through affiliated cable systems.

4. "Hilary in Hiding" was telecast in its entirety over the network on March 6, 1990. The March 6, 1990

documentary was provided to all affiliated cable systems and, upon information and belief, was transmitted to all of the subscribers of those affiliates.

5. The telecasts of "Hilary in Hiding" scheduled by the network for April 6, 7, 14 and 19, 1990 will be identical to the program that was telecast on March 6, 1990, and which is recorded on Exhibit A.

6. Prior to the March 6, 1990 telecast of the documentary, I had a telephone conversation with Elaine Mittleman, counsel for plaintiff Eric A. Foretich. During that conversation, Ms. Mittleman demanded to know what portions of videotape depicting Hilary Foretich would be telecast on the program. I described to her the contents of the tapes shown in the documentary. Ms. Mittleman objected to the showing of the tapes but conceded that, in light of the constitutional presumption against prior restraints on the news media, she probably would not succeed in preventing broadcast of the tapes. No legal action of any kind was brought to prevent the March 6, 1990 telecast of the documentary.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 1990, in Astoria, New York.

/s/ Patrick W. Guy
PATRICK W. GUY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF STEPHEN LAMBERT

Pursuant to 28 U.S.C. § 1746, Stephen Lambert does hereby depose and state as follows:

1. I have personal knowledge of the facts sworn to in this Declaration.

2. I produced the program entitled "Hilary in Hiding."

3. The program "Hilary in Hiding" includes a videotape of Hilary, which was filmed in the office of Mary Froning, a child abuse expert (the "videotape"). In the videotape, Hilary, through words and the use of anatomically correct dolls, explains and illustrates the sexual acts which her father allegedly performed on her and Heather, her step-sister.

4. The videotape was given to me by Dr. Elizabeth Morgan, Hilary's mother.

5. The videotape was filmed by Dr. Mary Froning; Dr. Froning was Hilary's therapist between February of 1986 and August of 1987.

6. Both Dr. Morgan and Dr. Froning were contacted regarding the advisability of including the videotape in

"Hilary in Hiding." Dr. Morgan and Dr. Froning both consented to the inclusion of the videotape in "Hilary in Hiding."

7. In order to protect the privacy interests of Hilary, we used recording techniques that obscured Hilary's face. Therefore, at no time was Hilary readily identifiable.

8. Prior to the first broadcast of "Hilary in Hiding" in the United States, Eric Foretich was given an opportunity to preview the program. On February 13, 1990, Eric Foretich visited our London office and viewed the program, including the videotape. Until the filing of this lawsuit, Foretich did not indicate that he had objections to the program or the inclusion of the videotape as part of the program on the grounds which he currently asserts in the Complaint and supporting documents.

9. Throughout the dispute regarding the alleged sexual abuse of Hilary, Foretich has maintained that Hilary personally has not asserted charges of sexual abuse against her father and that she was "coached" by her mother, Dr. Morgan. As a matter of fact, the question of whether Hilary was coached by Dr. Morgan is a central issue of the controversy. The videotape provides evidence which is highly relevant to the question of whether Hilary was coached by Dr. Morgan.

Executed on this 6th day of April, 1990, in London, England.

/s/ Stephen Lambert
STEPHEN LAMBERT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-0796-SS

ERIC A. FORETICH, *et al.*,
Plaintiffs,

v.

LIFETIME CABLE, *et al.*,
Defendants.

DECLARATION OF LEE LEVINE

Pursuant to 28 U.S.C. § 1746, Lee Levine does hereby depose and state, upon information and belief, as follows:

1. I have personal knowledge of the facts attested to in this Declaration.

2. I am a member of the Bar of this Court and of the District of Columbia Court of Appeals.

3. On January 20, 1990, the program "Saturday Night With Connie Chung," which is broadcast on the CBS television network, contained a segment entitled "Morgan v. Foretich." A videotape of this segment is submitted to the Court herewith as Exhibit A to this Declaration.

4. Depictions of Hilary Foretich substantially similar to those contained in the documentary "Hilary in Hiding" (the "documentary"), which is the subject of this litigation, were broadcast throughout the United States on January 20, 1990, on "Saturday Night With Connie Chung," during the segment entitled "Morgan v. Foretich."

5. In addition, countless newspaper articles, published in both national and Washington, D.C. area publications,

have reported on the subjects and events examined in the documentary.

6. Depictions of Hilary Foretich substantially similar to those included in the documentary have previously been broadcast or telecast by international, national and local broadcast and cable media.

7. Countless newspaper and magazine articles have published allegations and facts regarding the alleged sexual abuse of Hilary Foretich by Eric Foretich. Many of these articles have reported and discussed Hilary's own statements regarding the nature of the sexual abuse she claims her father perpetrated upon her. Many of these statements are substantially similar to those contained in the documentary at issue. *See, e.g.*, Exhibit B hereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 1990, in Washington, D.C.

/s/ Lee Levine
LEE LEVINE

Supreme Court, U.S.
FILED
AUG 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HILARY FORETICH,
Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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7 J. Moore, J. Lucas and K. Sinclair, Jr., Moore's Federal Practice (2d ed. 1990)

¶ 65.05 2

¶ 65.07 4

IN THE

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OCTOBER TERM, 1990

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HILARY FORETICH,

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PETITIONER'S REPLY MEMORANDUM

Respondents press one basic argument throughout their Brief in Opposition. They maintain that the court of appeals in this action "concluded, quite unremarkably, that this petitioner had not made the requisite showing to justify the injunctive remedy it sought." Br. in Opp. 7 (footnote omitted). Respondents cite the familiar evidentiary standard required for issuance of a preliminary injunction and assert that this case involves nothing more than a court of appeals' decision to reverse a district court's order because the order lacked adequate evidentiary support. The argument is plainly and demon-

strably wrong, and respondents' reliance on it is severely misplaced.

Contrary to respondents' view, this case does not involve a preliminary injunction. At this juncture, this case relates exclusively to the district court's issuance of a *temporary restraining order*.[1] And because a temporary restraining order, by its nature, merely preserves the status quo until more searching consideration can be given, and because it lasts for only a brief and defined period, the "requisite showing" for such an order is substantially different from the standard applied to the issuance of other, more enduring injunctive relief. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 85-86 (1974); *Backo v. Local 281, United Brotherhood of Carpenters and Joiners of America*, 438 F.2d 176, 180 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). *See generally* 7 J. Moore, J. Lucas and K. Sinclair, Jr., Moore's Federal Practice ¶ 65.05, at 65-100 (2d ed. 1990) ("A temporary restraining order is a temporary order entered . . . upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties or the court's jurisdiction upon a motion for a preliminary in-

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[1] *See* App. B, pp. 3a-4a (emphasis added) ("Upon consideration of the plaintiffs' application for a *temporary restraining order* . . . it is . . . ordered that the defendants are restrained from airing, licensing or distributing the scenes of the program, *Hilary in Hiding*, involving the minor's description of alleged sexual abuse *until April 17, 1990, . . . when the Court will hold a preliminary injunction hearing on this matter.*") *See also* App. C, pp. 31a-32a (emphasis added) ("I'll tell you what I'm going to do here. I believe I don't have enough data or information, and I will—I don't know. Because I think you do raise a good issue of the question of how are we going to label whatever this cause of action. But I do believe there is enough here to issue a TRO, and I'm going to issue a TRO for 10 days, and I'll set it for trial. . . . I believe that I am compelled to give the child's interests the higher priority here and to put a *TRO* on it at this time *until this matter can be further fully explored.*")

junction.") There is no requirement that the plaintiff prove likelihood of success on the merits or make a substantial evidentiary showing.

On the basis of evidence that was contained in the record—notably, the actual videotape of Hilary that was to be broadcast nationwide just a few hours later—the district court acted well within its discretion in concluding, for the limited purpose of issuing a temporary restraining order, that Hilary would suffer profound and irreparable harm if approximately three-and-a-half minutes of videotape were aired that evening and over the following week. The district court expressly acknowledged the evidentiary limitations under which it was acting, and the district judge scheduled a plenary evidentiary hearing to follow on April 17, 1990, at which time the issue of a preliminary injunction could be taken up. *See* App. B, p. 4a; App. C, pp. 33a-34a.

The district court's order in this case is closely akin to what the district court did in *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971)—the "Pentagon Papers" case. There the court issued a temporary restraining order lasting two days, "because in my opinion any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States Government if it should ultimately prevail." 328 F. Supp. at 325. The district court ultimately ruled that publication could not be barred, but it continued its temporary restraining order "until such time during the day as the Government may seek a stay from a Judge of the Court of Appeals for the Second Circuit." 328 F. Supp. at 331. The government did seek such a stay, and it was granted by the court of appeals, thereby further enabling the appellate court to review the merits while preserving the status quo. *See United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971).

This course of action was directly criticized by only one member of this Court when the case was brought before it. *See New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Brennan, J., concurring). In his opinion Justice Brennan expressly recognized that there do exist circumstances—where there is an asserted interest in the *form* of expression, as opposed to an attempt to suppress an idea itself—where injunctions against publications may properly issue. *See id.* at 726 n.*.

Moreover, nothing that the court of appeals did is consistent with the respondents' assertion that it was simply holding that "petitioner had not met its burden." Br. in Opp. 16. The court of appeals did not view the respondents as appealing from the district court's order as if it were a preliminary injunction. Indeed, temporary restraining orders are not ordinarily appealable. *See, e.g., Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977). *See generally* 7 J. Moore, J. Lucas and K. Sinclair, Jr., Moore's Federal Practice, pt. 2 ¶ 65.07, at 65-110 (2d ed. 1990). Consequently, the court issued a writ of mandamus. The court of appeals did not make any explicit determination as to the adequacy of the evidentiary support for the district court's actions; the court of appeals did not even have the district court record before it. The court of appeals issued an extraordinary writ of mandamus, on the sole ground that "[t]he district court's temporary restraining order constitutes a prior restraint . . . ." App. A, p. 1a. And on the basis of this bare legal conclusion, the court of appeals vacated the restraining order because it concluded that petitioner's *only* redress was "in [a] legal action[] that do[es] not require a prior restraint in derogation of the First Amendment." *Id.*

Contrary to respondents' efforts to trivialize the nature of this dispute and reduce it to a squabble over the sufficiency of particular evidence, the true holding of the

court of appeals is unmistakable. For the first time, and without support from this Court's precedents, the court of appeals declared that *any* prior restraint on a television broadcast of a film, no matter how carefully tailored or brief, violates the constitutional protection for free speech and freedom of the press. This declaration goes far beyond the proper contours of the prior restraint doctrine.

CONCLUSION

For the reasons stated in our petition and in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1990